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Should the Prosecution Be Allowed to Comment on a Defendant's Pre-Arrest Silence in Its Case-in-Chief?

I. INTRODUCTION

You have the right to remain silent[1]—or so you thought. The Fifth Amendment privilege against self-incrimination is one of the most important protections of individual rights in the United States' legal system.[2] The framers of the Constitution enacted this privilege in order to protect individuals from a long history of oppression by the State in interrogations and from other abuses of State authority.[3] The privilege is based upon the belief that the government may not penalize individuals merely for declining to answer possibly incriminating questions.[4] Today, in large part due to the popularity of police and law related television shows and movies, the right to remain silent is one of the best known constitutional rights.[5] Most defendants exercising the privilege before trial do not entertain the possibility that their silence may be used against them at trial.[6]

While most Americans may view the right to remain silent as an inalienable right protected by the United States Constitution, certain circuits of the United States Courts of Appeals have held that prosecutors may use silence occurring before arrest in their case-in-chief to imply the defendant's guilt.[7] In *United States v. Thompson*,[8] a recent Ninth Circuit decision, the defendant shot and killed a man in

1. *See* Miranda v. Arizona, 384 U.S. 436 (1966). For a discussion of *Miranda*, see *infra* Part II.D.

2. *See* LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT 431-32 (1968). The Fifth Amendment provides in part that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

3. *See* LEVY, *supra* note 2, at 431.

4. *See* Malloy v. Hogan, 378 U.S. 1, 8 (1964).

5. *See* Margaret Zack, *You Have the Right: 30 Years Later*, Miranda *Ruling Protects Suspects*, STAR TRIBUNE (Minneapolis-St. Paul), June 30, 1996, at 17A.

6. *See* Anne Bowen Poulin, *Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination*, 52 GEO. WASH. L. REV. 191, 210 (1984).

7. *See* United States v. Zanabria, 74 F.3d 590 (5th Cir. 1996); United States v. Simon, 964 F.2d 1082 (11th Cir. 1992); United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991); United States v. Davenport, 929 F.2d 1169 (7th Cir. 1991); United States v. Carter, 760 F.2d 1568 (11th Cir. 1985); United States v. Blankenship, 746 F.2d 233 (5th Cir. 1984); United States v. Massey, 687 F.2d 1348 (10th Cir. 1982).

8. 82 F.3d 849 (9th Cir. 1996).

his home during a drug deal.[9] When the police arrived, the defendant refused to answer some police questions, because he was scared and wanted to talk to a lawyer.[10]

In his closing argument, the prosecutor made the following comment concerning the defendant's refusal to answer police questions before his arrest:

> I am not going to make a big deal out of Mr. Thompson's response when the police come[sic] to the door following the shooting. I'm not going to make a big deal about it at all. But you got to admit, it's a little strange under the circumstances, have the police come in there, and the first thing they're going to say is "What happened?" "I want a lawyer." I mean, that's strange. That's not the way that people in circumstances that are legitimate are going to react. They would probably be inclined to tell the cop what happened; "This guy broke into my apartment." None of that happened. But then again, this is Mr. Thompson.[11]

The defendant in *Thompson* argued that this comment violated his privilege against self-incrimination protected by the Fifth Amendment.[12] Due to the absence of controlling Supreme Court precedent[13] and the existence of a significant split among the circuit courts on the issue,[14] the United States Court of Appeals for the Ninth

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9. *See id.* at 851. The defendant told police the victim threatened to murder him for $100 that the defendant owed the victim. *See id.*

10. *See id.* at 854. The defendant answered most questions, but refused to answer three. *See id.* The detective who interviewed the defendant testified that he was "kind of at a loss at that response because from my observations at the apartment, I assumed that he had possibly shot somebody that broke into his apartment, and normally under those circumstances, people I talk with are more than eager to tell me what happened." *Id.*

11. *Id.* at n.7. This statement was the final comment in the prosecution's closing argument. *See id.*

12. *Id.* Since the defendant did not properly object to these comments, the court reviewed for plain error. *See id.* at 854-55. "Plain" error is synonymous with "clear" or "obvious" error. United States v. Olano, 507 U.S. 725, 734 (1993). The *Thompson* court quoted a Second Circuit decision: "'we do not see how an error can be plain error when the Supreme Court and this court have not spoken on the subject, and the authority in other circuits is split.'" *Thompson*, 82 F.3d at 855 (quoting United States v. Alli-Balogun, 72 F.3d 9, 12 (2d Cir. 1995)). The *Thompson* court stated that this "commonsense conclusion" should apply in the Thompson case. *See id.*

13. *See Thompson*, 82 F.3d at 855. The court stated that the Supreme Court decisions coming closest to the issue were *Griffin v. California*, 380 U.S. 609 (1965), and *Jenkins v. Anderson*, 447 U.S. 231 (1980). *See id.* The court distinguished *Griffin* by pointing out that the holding in *Griffin* only applied to post-arrest, coercive situations. *See id.* The court distinguished *Jenkins* by pointing out that Jenkins had waived his Fifth Amendment rights by testifying, whereas Thompson did not. *See id.* For a discussion of *Griffin* and *Jenkins*, see *infra* Part II.E.

14. *See Thompson*, 82 F.3d at 855. *See also infra* Part III (discussing in detail the

Circuit held that the trial court's failure to exclude the prosecutor's comment was not "plain error" and that the defendant's conviction was not reversible on those grounds.[15]

This comment will begin by discussing the origin of the privilege against self-incrimination in England[16] and outline its development in the United States.[17] Next, it will explain the policy reasons behind the privilege.[18] The comment will then discuss the history of the privilege and the rules concerning the use of a defendant's silence in the Supreme Court.[19] It will then address the different treatment in the circuit courts regarding the use of pre-arrest silence in the prosecution's case-in-chief.[20] Finally, this comment will propose that the use of the defendant's pre-arrest silence in the prosecution's case-in-chief should be inadmissible.[21]

II. BACKGROUND

A. Development of the Privilege in England

The roots of the controversy leading up to the recognition of the privilege against self-incrimination can be traced to thirteenth century England.[22] The ecclesiastical courts of England adopted a procedure known as the oath ex officio.[23] The oath contained a sworn statement by the defendant promising to give honest answers to all questions asked of him.[24] While the oath was disguised as an inquiry, the clear

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split in the circuit courts).

15. *Thompson*, 82 F.3d at 856. The court stated that it did not intend to express any opinion on the constitutionality of the prosecutor's comments in its holding. *See id.*

16. *See infra* Part II.A.

17. *See infra* Part II.B.

18. *See infra* Part II.C.

19. *See infra* Parts II.D-E.

20. *See infra* Part III.

21. *See infra* Parts IV-V.

22. *See* 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2250, at 267-70 (John T. McNaughton, rev. ed., 1961).

23. *See* MARK BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION 6 (1946). The oath ex officio was the creation of Pope Gregory IX and was introduced in England by Cardinal Otho during the reign of Henry III. *See* LEVY, *supra* note 2, at 46. One of Cardinal Otho's decrees (called constitutions) provided that "the oath of calumny to tell the truth in ecclesiastical causes, in order that truth may be more easily uncovered and causes more speedily finished, shall henceforth be administered throughout the realm of England . . . ." *Id.*

24. *See id.* at 46-47. This process was unfair for many reasons. *See id.* at 47. First, the accused was required to give the statement without knowing the nature of the charges to be filed against him. *See id.* Second, the accused was not given any indication of who his accusers were or what evidence they had against him. *See id.* A court could institute

purpose behind the practice was to elicit a confession from the defendant.[25] If the defendant refused to take the oath, the court had the power to coerce the accused into taking the oath by threatening contempt of court, conviction, or even torture.[26] This overwhelming power given to the ecclesiastical courts resulted in significant opposition, particularly from the Puritans, who viewed this practice as an effort to identify religious dissenters and to suppress their activities.[27] As a result of this opposition, statutes were enacted that abolished the oath in ecclesiastical courts.[28]

Despite its abolition in the ecclesiastical courts, the common law courts continued to use the oath in criminal proceedings.[29] However, powerful opposition to the oath continued.[30] Eventually, near the end of the seventeenth century, defendants simply began refusing to take the oath, claiming that "no man is bound to incriminate himself on any charge . . . in any court."[31] Progressively, the common law courts upheld such claims, giving birth to the privilege against self-

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the proceeding on its own motion and play the role of accuser, prosecutor, judge, and jury. *See* BERGER, *supra* note 23, at 5-6. Often, rumor or suspicion were sufficient grounds for the institution of the proceeding. *See id.*

25. *See* LEVY, *supra* note 2, at 46-47. According to Berger, the defendant had little choice about whether to take the oath. *See* BERGER, *supra* note 23, at 6. He was condemned if he refused to take the oath, and condemned if he took the oath. *Id.* "In the hands of a skillful interrogator, the inquisitorial proceeding and oath were extremely powerful tools and nearly foolproof in securing the conviction of those against whom they were directed." *Id.*

26. *See* Lisa Tarallo, Note, *The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come for the United States Supreme Court to End Its Silence on the Rationale Behind the Contemporary Application of the Privilege*, 27 NEW ENG. L. REV. 137, 139 (1992) (citing BERGER, *supra* note 23, at 25). Those who refused to take the oath were often condemned to be "whipped and pilloried." ERWIN GRISWOLD, THE FIFTH AMENDMENT TODAY 3 (1955).

27. *See* BERGER, *supra* note 23, at 11.

28. *See* 8 WIGMORE, *supra* note 22, § 2250, at 284. Parliament passed a bill in 1641 prohibiting the use of the oath ex officio as an ecclesiastical procedure. *See id.* at 283-84. Parliament addressed this issue largely because of the case of "Freeborn John" Lilburn. *See* GRISWOLD, *supra* note 26, at 3. Lilburn was arrested and charged with publishing heretical and seditious books. *See id.* He refused to take the oath and was "whipped and pilloried." *Id.* The House of Commons eventually vacated his sentence. *See id.* This statutory abolition followed many years of attempts by the common law courts to restrict the inquisitorial process. *See* FRED E. INBAU, SELF-INCRIMINATION: WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO 4 (1950). It is interesting and disturbing to note that the reason behind the common law courts' resistance to the practice of administering the oath ex officio was not concern for the abhorrent practices inherent in the inquisitorial process, but rather concern for the increasing power of the ecclesiastical courts. *See id.*

29. *See* INBAU, *supra* note 28, at 4.

30. *See id.*

31. 8 WIGMORE, *supra* note 22, § 2250, at 289.

incrimination, which holds that no individual should be compelled to give self-incriminating testimony.[32]

B. Adoption of the Privilege in the United States

Due to the influence of the English legal system on the colonies, some courts in the colonies originally administered the oath ex officio.[33] However, opposition to the practice in the colonies was strong.[34] During the ratification process of the United States Constitution, the Bill of Rights was drafted to protect the citizens from potential abuse of power and oppression by the national government.[35] James Madison drafted the first proposed version of the privilege against self-incrimination, which stated that no person "shall be compelled to be a witness against himself."[36] This self-incrimination clause was incorporated into the Fifth Amendment of the United States Constitution, which provides that "no person shall . . . be compelled in any criminal case to be a witness against himself."[37] This privilege has evolved significantly, as courts have protected and interpreted this important constitutional right.[38]

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32. *See id.* at 290.

33. *See* BERGER, *supra* note 23, at 21. Note, however, that the influence of the English use of the oath ex officio was inconsistent among the colonies. *See id.* Those colonies formed by persons who had suffered in England as a result of the oath ex officio refused to establish the practice and recognized the right against self-incrimination. *See id.* Other colonies, formed under a religious belief system, established the practice, however, as a means of suppressing differing religious beliefs. *See id.*

34. *See id.* Gradually, the belief that an individual had a right not to incriminate himself gained widespread acceptance. *See id.*

35. *See id.* at 22. The colonists expressed concern that, without the right not to incriminate oneself, the federal government could not insure the protection of individuals from the "evils that lurk[ed] in the shadows of a new and untried sovereignty." R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 789 (1935).

36. BERGER, *supra* note 23, at 22-23 (citing VIRGINIA DECLARATION OF RIGHTS, 58 (1776)).

37. U.S. CONST. amend. V. By this time, the right to remain silent had been included in almost every state constitution. *See* BERGER, *supra* note 23, at 22. As written, the privilege would have been applicable in both criminal and civil proceedings. *See id.* The first House of Representatives amended the provision, making it applicable only in criminal matters. *See id.*

38. *See, e.g.*, Fletcher v. Weir, 455 U.S. 603 (1982) (per curiam) (stating that a State does not violate due process by permitting cross-examination as to post-arrest silence when the defendant chooses to take the stand); Jenkins v. Anderson, 447 U.S. 231 (1980) (holding that pre-arrest silence may be used to impeach a criminal defendant's credibility); Doyle v. Ohio, 426 U.S. 610 (1976) (barring the use of post-arrest silence to impeach a criminal defendant when *Miranda* warnings had not been administered); United States v. Hale, 422 U.S. 171 (1975) (ruling that silence following arrest and the delivery of *Miranda* warnings is ambiguous and overly prejudicial and invalid for

C. *Policy Reasons Behind the Privilege Against Self-Incrimination*

Courts and commentators have postulated several policy reasons supporting the Fifth Amendment privilege against self-incrimination.[39] One of the most widely accepted policies behind the application of the privilege is preventing individuals from being subjected to the "cruel trilemma of self-accusation, perjury, or contempt."[40] This policy recognizes that it is "inherently cruel to make a man an instrument in his own condemnation."[41] Furthermore, the policy plays a role in protecting the accusatorial nature of the United States' criminal justice system.[42] The privilege helps to ensure that the prosecution bears the burden of proof in a criminal prosecution and that "a fair state-individual balance" is preserved.[43] To this end, the privilege is intended to guarantee that "the government seeking to punish an

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impeachment purposes); Kastigar v. United States, 406 U.S. 441 (1972) (holding that the government may compel a witness to testify by conferring immunity from the use of compelled testimony in subsequent criminal prosecutions); Miranda v. Arizona, 384 U.S. 436 (1966) (barring the prosecution's use of any statement stemming from questioning by law enforcement after a person has been taken into custody unless the prosecution demonstrates that the person's Fifth Amendment privilege against self-incrimination was secured); Griffin v. California, 380 U.S. 609 (1965) (holding that a prosecutor's statement of defendant's failure to testify as to matters that he can reasonably be expected to deny or explain is evidence of guilt violates the Fifth Amendment); United States v. Raffel, 271 U.S. 494 (1926) (finding that voluntary testimony waives the Fifth Amendment privilege).

The Fifth Amendment privilege against self-incrimination was made applicable to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964). The *Malloy* Court held that the Fifth Amendment was binding upon the states because, "the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination." *Id.* at 3.

39. *See* Mary A. Shein, Comment, *The Privilege Against Self-Incrimination Under Seige*: Asherman v. Meachum, 59 BROOK L. REV. 503, 508-11 (1993). Shein offers the following policy reasons for the privilege: (1) preventing individuals from being subject to either self-accusation, perjury, or contempt; (2) preserving the accusing nature of the criminal justice system; (3) preventing abuse by government officials; and 4) protecting an individual's privacy. *See id.* at 509-11.

40. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). *See also* Miranda v. Arizona, 384 U.S. 436, 461 (1966) (holding that the privilege protects individuals from both legal compulsion and the "informal compulsion exerted by law enforcement officials during in-custody questioning").

41. David Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CAL. L. REV. 89, 95 (1965). *See also* GRISWOLD, *supra* note 26, at 7. "[W]e do not make even the hardened criminal sign his own death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands. We have through the course of history developed a considerable feeling of the dignity and intrinsic importance of the individual man. Even the evil man is a human being." *Id.*

42. *See Murphy*, 378 U.S. at 55.

43. *Id.* The drafters of the Constitution recognized that the Bill of Rights was necessary to protect individuals from excessive government power. *See* BERGER, *supra* note 23, at 226.

individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."[44] The privilege also helps to limit the government's power in criminal prosecutions.[45] If the prosecution were allowed to force defendants to incriminate themselves and then use the information to aid in obtaining a conviction, defendants would have little with which to protect themselves from the power of the government over the administration of the criminal justice system.[46]

Another reason advanced in support of the privilege against self-incrimination is that it helps prevent physical and psychological abuse by government officials.[47] Some argue that without the privilege's protection, the government could use highly coercive techniques to gain evidence against the defendant.[48] Moreover, some commentators have expressed a fear that, without the privilege, criminal law in the United States could revert back to the primitive and oppressive oath ex officio procedure which existed in England and in some of the original colonies.[49] Finally, the privilege reflects society's "respect for the inviolability of the human personality and the right of each individual 'to a private enclave where he may lead a private life.'"[50]

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44. Miranda v. Arizona, 384 U.S. 436, 460 (1966) (citing Chambers v. Florida, 309 U.S. 227, 235-38 (1940)). "[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors . . . ." *Id.*

45. *See* BERGER, *supra* note 23, at 40-41 ("[W]ithout [the privilege against self-incrimination], and in light of the state's extensive investigatory power and vast array of criminal prohibitions, the result would be a grant of too much authority to control the individual and too little power to prevent excesses.").

46. *See id.* at 39-41. *See also* Shein, *supra* note 39, at 510 (arguing that the right against self-incrimination is one of the few limitations imposed upon the government in its administration of the criminal justice system).

47. *See Murphy*, 378 U.S. at 55. *See also* LEVY, *supra* note 2, at 326-27 (stating that the privilege against self-incrimination developed concomitantly with the desire to eliminate torture as a government practice in interrogations).

48. *See* BERGER, *supra* note 23, at 35 ("Compelled self-incrimination, if tolerated, might well prove to be too tempting a tool for use against minority views.").

49. *See id.* For an explanation of the oath ex officio procedure, see *supra* Part II.A. The oath ex officio procedure was often administered during a time when the rack, the pillory, beatings, and whippings were common forms of torture. *See* LEVY, *supra* note 2, at 326-27. Often, actual torture was not necessary to elicit a confession, only the threat of torture. *See id.*

50. *Murphy*, 378 U.S. at 55 (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)).

D. Development of the Constitutional Doctrine in the Courts

Little evidence exists about the intention of the drafters of the Constitution in their wording of the Fifth Amendment.[51] Despite this lack of legislative history, the Supreme Court has never comprehensively interpreted the language of the Fifth Amendment and has never stated outright what it thought the drafters intended the Amendment to mean.[52] Rather, the Court has expanded the meaning of the words one step at a time, case by case.[53] This lack of concrete interpretation has deprived the lower courts of the guidance and substantive principles needed to apply the Fifth Amendment privilege to cases of first impression.[54] Modern courts have been left to fend for themselves, and have extended the scope of the privilege far beyond the literal meaning of the words.[55] For example, nowhere in the Fifth Amendment does one find the words "the right to remain silent," "the right to have counsel present," or "anything said can and will be used against the individual in court;"[56] yet, the Supreme Court has interpreted the privilege as containing these rights.[57]

The Supreme Court has established three basic legal principles in the application of the Fifth Amendment privilege against self-incrimination. First, an invocation of the privilege against self-incrimination must be given a liberal construction.[58] Second, the

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51. *See* 8 WIGMORE, *supra* note 22, § 2252, at 324.

52. *See generally* BERGER, *supra* note 23, at 50-55 (discussing differing views of the Fifth Amendment, as well as the Supreme Court case regarding the privilege against self-incrimination).

53. *See id.*

54. *See* Tarallo, *supra* note 26, at 138-39.

55. *See* BERGER, *supra* note 23, at 49-50. If the privilege were interpreted narrowly, it would merely prohibit the prosecution from compelling the defendant to take the stand at his own criminal proceeding. *See id.* at 50. Giving the privilege this narrow interpretation would have resulted in redundancy, however, because most jurisdictions already barred a defendant from testifying at his own trial. *See id.* The rationale behind disallowing a defendant from testifying on his own behalf was that his testimony would be too biased and unreliable. *See id.*

56. U.S. CONST. amend. V.

57. *See* Miranda v. Arizona, 384 U.S. 436, 467-69 (1966).

58. *See* Hoffman v. United States, 341 U.S. 479, 486 (1951). According to the Court in *Hoffman*, the privilege was added to the Bill of Rights in the belief that "'too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed.'" *Id.* (quoting Feldman v. United States, 322 U.S. 487, 489 (1944)). Further, in *Counselman v. Hitchcock*, the Supreme Court held that liberal construction is necessary to protect the right the Fifth Amendment was intended to secure. *See* 142 U.S. 547, 562 (1892), *overruled in part by* Kastigar v. United States, 406 U.S. 441, 455 (1972) (reasoning that although the holding of *Counselman* is sound, the broad language in *Counselman* is not binding authority because it derives from an analysis of a statute that was held

invocation of the privilege is not dependent upon the defendant's choice of words.[59] In other words, the defendant need not use any special or magic combination of words to invoke the privilege.[60] Third, the privilege may be used by suspects who are merely being questioned during the investigation of a crime, as well as by those in custody, or by those already charged with a crime.[61] According to the Supreme Court in *Kastigar v. United States*,[62] the right to remain silent "can be asserted in any proceeding, civil or criminal, administrative or judicial, *investigatory* or adjudicatory . . . ."[63] Thus, the Supreme Court has interpreted the privilege against self-incrimination to include both the right to refrain from answering questions during a custodial interrogation and the right to refuse to take the stand in a criminal trial.[64]

In 1966, the Supreme Court further clarified and interpreted the Fifth Amendment privilege against self-incrimination in *Miranda v. Arizona*.[65] The *Miranda* Court clarified that the Fifth Amendment privilege against self-incrimination provided to an accused person the right to refuse to answer questions and to remain silent when being interrogated during the investigation of a crime.[66] Specifically, the

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"insufficient for failure to prohibit the use of evidence derived from compelled testimony"). Similarly, the Fifth Circuit stated that "even the most feeble attempt to claim a Fifth Amendment privilege must be recognized . . . ." United States v. Goodwin, 470 F.2d 893, 902 (5th Cir. 1972).

59. *See* Quinn v. United States, 349 U.S. 155, 162 (1955). "[No] magic language or ritualistic formula is required to assert the [Fifth Amendment] privilege [against self-incrimination] which is effectively invoked by any language which the court should reasonably be expected to understand as an attempt to claim the privilege." State v. Bell, 298 A.2d 753, 756 (N.H. 1972) (Kenison, C.J.) (citing *Quinn*, 349 U.S. at 163). Furthermore, in determining whether the privilege has been invoked, the "entire context in which the claimant spoke must be considered." *Goodwin*, 470 F.2d at 902.

60. *See Quinn*, 349 U.S. at 162.

61. *See* Kastigar v. United States, 406 U.S. 441, 444 (1972).

62. 406 U.S. 441 (1972).

63. *Id.* (emphasis added).

64. *See id.*

65. 384 U.S. 436 (1966). The *Miranda* case is actually four cases, consolidated for appeal. *See id.* at 456-57. In each of the cases, the defendant was interrogated while in the custody of police in an isolated room. *See id.* at 445. None of the defendants was given a full warning of his rights before the questioning. *See id.* In each of the four cases, the defendants gave either an oral admission or a signed statement of confession, which was used against them at trial. *See id.*

66 *See id.* at 444. The *Miranda* case was decided in response to the decision in *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Miranda*, 384 U.S. at 440. In *Escobedo*, the defendant was taken into custody and was interrogated by police in an effort to extract a confession. *See id.* at 440. The police did not tell the defendant he had a right to remain silent or that he had a right to an attorney. *See id.* The defendant was questioned for four hours, while handcuffed and standing, until he confessed. *See id.* During this

Court held that the prosecution could not use statements obtained during a custodial interrogation unless it demonstrated that certain procedural safeguards were present during the questioning.[67]

Among the procedural safeguards described in *Miranda* are the requirements that prior to any interrogation, the accused must be informed that he has a right to remain silent,[68] that anything he says may be used as evidence against him in court,[69] and that he has the right to be represented by an attorney.[70] If at any point during the

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interrogation, the police refused the defendant's requests to speak to his attorney and disallowed the defendant's retained attorney, who was waiting at the police station, from consulting with the defendant. *See id.* The *Escobedo* court affirmed the defendant's Fifth Amendment privilege to refuse to be compelled to incriminate himself and his right to be represented by an attorney and disallowed the defendant's confession. *See id.* at 442. The *Escobedo* decision remained silent, however, on the issue of whether a defendant must be informed of these rights before questioning. *See id.*

67. *See id.* at 436. The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. The Court discussed at length some of the reasons for the procedural safeguards it imposed, including the history of physical brutality in custodial interrogations. *See id.* at 444-46. The Court pointed out that in the past, the police often resorted to beatings, hangings, whippings, and other violence during interrogation in order to extract confessions from the accused. *See id.* The Court cited a case decided only a year prior to *Miranda* in which the police brutally beat, kicked, and placed lighted cigarette butts on the back of a potential witness during interrogation. *See id.* at 446 (citing People v. Portelli, 205 N.E.2d 857 (N.Y. 1965)). The Court also expressed concern over the mentally coercive nature of in-custody interrogations. *See id.* at 461. The court asserted that "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak." *Id.* In order to demonstrate the inherently coercive nature of custodial interrogations, the Court gave several examples of interrogation techniques explained in an actual police manual. *See id.* at 452-55. The manual advises the interrogator to be alone with the defendant and cut him off from any outside support. *See id.* at 455. Further, an interrogator should have an "aura of confidence" in the defendant's guilt in order to undermine the defendant's will. *Id.* The manual advises relentless questioning. *See id.* Finally, the manual suggests that if normal procedures fail to extract a confession, the police should resort to deceptive techniques such as giving false legal advice and tricking the defendant out of exercising his constitutional rights. *See id.*

68. *See id.* at 467-68. The Court stated that this warning is necessary to inform defendants who are not aware of the privilege. *See id.* at 468. Further, this warning is needed to overcome the inherent pressures of custodial interrogation. *See id.*

69. *See id.* at 469. The Court explained that this warning is necessary because without an understanding of this concept, a defendant cannot have a "real understanding and intelligent exercise" of the Fifth Amendment privilege. *Id.*

70. *See id.* at 471. A defendant has a right to consult with an attorney before questioning and to have the lawyer present during questioning. *See id.* The fact that a defendant does not ask for an attorney before questioning does not constitute a waiver of this right. *See id.* at 470. The Court pointed out that the individual who does not ask for an attorney before interrogation may be the person who most needs the assistance of an attorney. *See id.* at 470-71. The accused may waive any of these rights, as long as the

custodial interrogation, the accused indicates that he wishes to remain silent, the police must cease questioning him.[71] The Court emphasized that simply because the individual answers some questions or offers information to the police does not deprive him of the right to suspend answering questions or speaking with the authorities at any time until consulting with an attorney.[72]

The Court in *Miranda* stated that these procedural safeguards are necessary to allow an accused a full opportunity to exercise his privilege against self-incrimination.[73] The Court concluded that without these safeguards, the custodial interrogation process contains inherently coercive pressures which serve to weaken the accused's ability to resist, and to force the accused to speak against his free will.[74] In order to protect the accused in this process, the Court stated that the Fifth Amendment privilege is necessary, can be used outside of criminal court proceedings, and "serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."[75] This statement implies that the *Miranda* requirements are not limited to the setting of a custodial interrogation; they may be extended to a non-custodial, pre-arrest situation, if the situation involves the possibility

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"waiver is made voluntarily, knowingly and intelligently." *Id.* at 444. A heavy burden rests with the government to prove that the defendant made a valid waiver of these rights. *See id.* at 475 (citing *Escobedo*, 378 U.S. at 490 n.14).

71. *See id.* at 473-74. This silence constituted the invocation of the Fifth Amendment privilege. *See id.* at 474. The Court stated that any statement made after the privilege is invoked must be the product of compulsion. *See id.*

72. *See id.* at 445. Furthermore, if the accused communicates at any stage that he wishes to speak to an attorney, the interrogation must cease until an attorney is present. *See id.* at 474. At this point, the defendant must have the opportunity to consult with his attorney and to have an attorney present for any additional questioning. *See id.*

73. *See id.* at 444.

74. *See id.* at 467. In his dissent, however, Justice White stated that the test to determine whether an interrogation was coercive or not has been to consider whether the "totality of circumstances deprived the defendant of a 'free choice to admit, to deny, or to refuse to answer,' and whether physical or psychological coercion was of such a degree that 'the defendant's will was overborne at the time he confessed.'" *Id.* at 534 (White, J., dissenting) (quoting Lisenba v. California, 314 U.S. 219, 241 (1941); Haynes v. Washington, 373 U.S. 503, 513 (1963)).

75. *Id.* at 467. Justice Harlan disagreed in his dissent. *See id.* at 504 (Harlan, J., dissenting). Justice Harlan stated, "I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large. How serious these consequences may prove to be only time can tell. But the basic flaws in the Court's justification seem to me readily apparent now once all sides of the problem are considered." *Id.* (Harlan, J., dissenting). Justice Harlan continued, "the Court portrays the evils of normal police questioning in terms which I think are exaggerated." *Id.* at 517 (Harlan, J., dissenting).

of self-incrimination.[76]

E. Prosecution's Use of Defendant's Silence

Although the *Miranda* decision established that an accused has the right to remain silent, it did not address whether the prosecution may use such silence to imply that the defendant is guilty.[77] While the Court has never explicitly decided whether pre-arrest silence may be used to imply guilt, it has ruled that pre-arrest silence may be used to impeach a defendant's testimony.[78] However, the Court has also held that the prosecution may not use post-arrest silence or the defendant's failure to take the stand to imply guilt.[79]

1. Pre-Arrest Silence

The Supreme Court has never decided whether the prosecution may use a defendant's pre-arrest, pre-*Miranda* silence in its case-in-chief to imply guilt.[80] The Court held in *Jenkins v. Anderson*,[81] however, that a prosecutor may use pre-arrest silence to impeach a defendant's credibility if he takes the stand in his defense.[82] The logic behind admitting such evidence is that the silence amounts to a prior inconsistent statement.[83] In *Jenkins*, the defendant was charged with murder.[84] The defendant admitted that he stabbed the victim, but claimed he had acted solely in self-defense and took the stand to assert this defense.[85] The prosecution cross-examined the defendant about the defendant's failure to go to the police to explain the occurrence; the prosecution also referred to the defendant's pre-arrest silence in its closing argument.[86]

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76. *See id.* at 467.

77. *See supra* text accompanying notes 65-76

78. *See infra* text accompanying notes 80-93.

79. *See infra* text accompanying notes 94-126.

80. *See* United States v. Thompson, 82 F.3d 849, 855 (9th Cir. 1996).

81. 447 U.S. 231 (1980).

82. *See id.* at 240-41.

83. *See* United States v. Nabors, 707 F.2d 1294, 1298 (11th Cir. 1983).

84. *See Jenkins*, 447 U.S. at 232. The defendant was convicted of manslaughter in the trial court and the conviction was affirmed by the Michigan Court of Appeals. *See id.* at 234.

85. *See id.* at 233. The defendant testified on cross-examination that he tried "[t]o push that knife in [the victim] as far as [he] could," but insisted that he stabbed the victim in self-defense. *Id.*

86. *See id.* at 233-34. The defendant admitted on cross-examination that he had waited two days to tell anyone about the stabbing and waited a full two weeks to report the incident to police. *See id.* at 233. The prosecutor used this testimony to impeach the defendant's credibility. *See id.* at 235. The prosecutor suggested that had the killing

On appeal, the Supreme Court held that the Fifth Amendment was not violated by the prosecution's use of the defendant's pre-arrest silence, because it was used to impeach the defendant's credibility.[87] The Court ruled that, although the use of a defendant's silence by a prosecutor is improper when the defendant asserts the right to remain silent during trial, use of pre-arrest silence is proper to impeach the defendant when he testifies in his own defense.[88] The Court based its decision on *United States v. Raffel*,[89] which held that the use of a defendant's silence for impeachment purposes does not violate the Fifth Amendment.[90] The Court recognized that a person facing arrest will be afraid to remain silent if his silence can later be used to impeach him,[91] but stated that when the defendant decides to speak, it opens the door to such use by "cast[ing] aside his cloak of silence and advanc[ing] the truthfinding function of the criminal trial."[92] The Court expressly noted that it did "not consider whether or under what circumstances pre-arrest silence may be protected by the Fifth Amendment."[93]

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truly been in self-defense, the defendant would not have waited so long to tell his story to police. *See id.* The defendant argued on appeal that the prosecutor's comments violated his Fifth Amendment right to remain silent and that the Fifth Amendment prohibits comments on silence. *See id.*

87. *See id.* at 238. The Court recognized that *Doyle v. Ohio*, 426 U.S. 610 (1976), prohibits the use of silence for impeachment purposes if the silence comes after the *Miranda* warnings have been given. *See Jenkins*, 447 U.S. at 239-40. The Court reasoned that the unfairness resulting from the use of silence for impeachment purposes in *Doyle* did not exist in *Jenkins* because the government did not induce the defendant in *Jenkins* to remain silent by reading him his *Miranda* rights. *See id.* at 240.

88. *See id.* at 235.

89. 271 U.S. 494 (1926).

90. *See Jenkins*, 447 U.S. at 235 (citing *Raffel*, 271 U.S. at 495). In *Raffel*, the defendant was tried twice for the same crime. *Raffel*, 271 U.S. at 495. He chose not to take the stand at his first trial. *See id.* At his second trial, Raffel took the stand to deny making a statement attributed to him, and cross-examination revealed that he had not testified at his first trial. *See id.* The *Raffel* Court held that the questions concerning prior silence were permissible because the defendant could be cross-examined like any other witness when he took the stand in his own defense. *See id.* at 496-97. "The immunity from giving testimony is one which the defendant may waive by offering himself as a witness." *Id.*

91. *See Jenkins*, 447 U.S. at 236. Despite the Court's recognition of a person's fear when faced with arrest, it explained that "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Id.* (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973)).

92. *Id.* at 238. The Court pointed out that the defendant can always decide not to take the stand in his own defense in order to avoid cross-examination if he does not want his silence to be used against him. *See id.*

93. *Id.* at 236 n.2. The court stated that it need not reach the issue of whether and when pre-arrest silence is protected by the Fifth Amendment because the *Raffel* decision

2. Post-Arrest, Pre-*Miranda* Silence

The Supreme Court has also ruled that the prosecution may use a defendant's silence for impeachment purposes if the silence occurs after arrest but before *Miranda* warnings.[94] In *Fletcher v. Weir*,[95] the Court held that if the defendant is not given the affirmative assurances contained in the *Miranda* warnings before the silence and takes the stand in his own defense, the Fifth Amendment is not violated if the State cross-examines the defendant concerning such silence.[96] The Court reasoned that the *Miranda* warnings induce silence by implicitly assuring the defendant that his silence will not be used against him.[97] In the absence of these assurances, the Court ruled that unfairness does not result from the use of silence to impeach the defendant's credibility.[98]

While the *Jenkins* and *Fletcher* decisions taken together establish that pre-arrest silence, and post-arrest, but pre-*Miranda* silence, may be utilized to impeach a defendant's credibility if he takes the stand in his own defense, they do not address the issue of whether such evidence may be used in the prosecution's case-in-chief to imply that the defendant is guilty.[99] As with pre-arrest, pre-*Miranda* silence, the Court has never decided whether post-arrest, pre-*Miranda* silence may be used in the prosecution's case-in-chief to imply the defendant's guilt.

3. Post-Arrest, Post-*Miranda* Silence

Although the Court has held that the prosecution may use a defendant's pre-arrest silence and post-arrest, pre-*Miranda* silence to

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"clearly permits impeachment" by use of pre-arrest silence. *Id.*

94. *See* Fletcher v. Weir, 455 U.S. 603, 607 (1982) (per curiam). The defendant in *Fletcher* was charged with the murder of Ronnie Buchanan. *See id.* at 603. Buchanan allegedly pinned Weir to the ground in a fight in a nightclub parking lot. *See id.* During the fight, Weir stabbed Buchanan. *See id.* Buchanan later died from the stab wounds. *See id.* Weir left the scene immediately and did not report the altercation to police. *See id.* At trial, the defendant admitted that he had stabbed the victim, but asserted that he had acted in self-defense. *See id.* This testimony was the first time the defendant had told anyone that he had acted in self-defense, so the prosecutor cross-examined him as to why he had not offered this story to police. *See id.* at 603-04. The defendant was eventually convicted of first-degree manslaughter. *See id.*

95. 455 U.S. 603 (1982) (per curiam).

96. *See id.* at 607.

97. *See id.* at 605-06. The Court stated that the mere arrest of a defendant was not government action that induced a defendant to remain silent. *See id.*

98. *See id.* at 607.

99. Jenkins v. Anderson, 447 U.S. 231 (1980); *Fletcher*, 455 U.S. at 603.

impeach a defendant,[100] the Court has held that the prosecution may not use a defendant's silence to impeach if it occurs after arrest and *Miranda* warnings.[101] The Supreme Court held in *Doyle v. Ohio*[102] that prosecutorial use of post-arrest, post-*Miranda* silence to impeach a defendant's credibility violated the defendant's constitutional rights.[103] The *Doyle* court stated that because of the nature of *Miranda* warnings, it would be a violation of due process to allow comment on the silence that *Miranda* warnings may have encouraged.[104] Although *Miranda* warnings do not contain an express assurance that silence will carry no penalty, the warnings imply such an assurance to a person receiving the warnings.[105] The Court also reasoned that a defendant's post-arrest silence, being "insolubly ambiguous," has low probative value.[106] For these reasons, the Court concluded that it would be "fundamentally unfair" and a "deprivation of due process" to allow post-*Miranda* silence to be used to impeach a defendant's subsequent

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100. *See supra* Parts II.E.1-2.

101. *See* Doyle v. Ohio, 426 U.S. 610 (1976); *see also* United States v. Hale, 422 U.S. 171 (1975). The Court in *Jenkins* distinguished *Doyle* by reasoning that the unfairness resulting from the use of silence to impeach in *Doyle* did not exist in *Jenkins* because the government did not induce the defendant in *Jenkins* to remain silent by reading the defendant his *Miranda* rights. *See Jenkins*, 447 U.S. at 240.

102. 426 U.S. 610 (1976).

103. *See Doyle*, 426 U.S. at 611. The defendant was arrested and charged with selling ten pounds of marijuana to a police informant. *See id.* at 611. The defendant was in possession of $1320 at the time of his arrest. *See id.* At trial, the defendant claimed that he had been framed by the informant. *See id.* at 613. He claimed that the arrangement had been for the defendant to buy the ten pounds of marijuana. *See id.* He testified that the informant grew angry, took his ten pounds of marijuana back and threw the $1320 into the truck for no apparent reason. *See id.* The prosecution tried to impeach this story by questioning the defendant about the fact that he did not tell this story to police. *See id.*

104. *See id.* at 618. "Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." *Id.* at 619. Thus, the defendant's silence in this situation is "insolubly ambiguous." *Id.* at 617.

105. *See id.* at 618. The Court felt Justice White's comment in *Hale* was representative of its position:

> [W]hen a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony . . . .

Id. at 619 (quoting *Hale*, 422 U.S. at 183 (White, J., concurring)).

106. *See Doyle*, 426 U.S. at 617 n.8. The Court recognized that silence may be ambiguous entirely apart from the *Miranda* warnings because there may be several innocent explanations for the silence. *See id.* (citing *Hale*, 422 U.S. at 177).

explanation at trial.[107]

Similarly, the Supreme Court held in *United States v. Hale*[108] that post-arrest silence could not be used by the prosecution to impeach a defendant's testimony at trial.[109] However, the *Hale* Court's reasoning differed from that of the *Doyle* Court.[110] Justice Marshall wrote that such evidence should be excluded because the probative value of post-arrest silence is very low and the prejudicial effect is very high.[111] Even after the *Doyle* and *Hale* decisions, however, post-arrest silence may be used to impeach a defendant who testifies to a version of the events and claims to have told the police the same version after arrest.[112]

While *Doyle* bars use of a defendant's silence to impeach if the silence occurs after *Miranda* warnings have been given, it does not address the issue of whether the prosecution may use silence to impeach if the silence occurs before *Miranda* warnings or arrest.[113] Some circuit court decisions have held that a prosecutor may not comment on a defendant's silence if it occurs after arrest but before the

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107. *See id.* at 618. The Court ordered that the defendant's conviction be reversed and the cause be remanded to the state court. *See id.* at 620.

108. 422 U.S. 171 (1975).

109. *See id.* The defendant in *Hale* was arrested for robbery. *See id.* at 171. When asked post-*Miranda* why he had a significant amount of cash on his person shortly after the robbery, the defendant remained silent. *See id.* At trial, the defendant claimed that his wife had received her welfare check the day of the robbery and had given the defendant cash to purchase money orders for her. *See id.* at 174. The prosecution used the defendant's silence after arrest to attempt to impeach this explanation. *See id.*

110. *See id.* at 180. The Court's reasoning for disallowing the use of post-arrest silence was not the Fifth Amendment privilege against self-incrimination, but rather the belief that the probative value of the evidence was low and its prejudicial effect was high. *See id.* The Court did not discuss whether the probative value of silence occurring before arrest was also low.

111. *See id.* Justice Marshall, writing the opinion for the Court, stated, "In most circumstances silence is so ambiguous that it is of little probative force." *Id.* at 176. Marshall also wrote that reference to post-arrest silence carries with it a "significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest." *Id.* at 180.

112. *See Doyle*, 426 U.S. at 619 n.11.

> It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.

Id. (citing United States v. Fairchild, 505 F.2d 1378, 1383 (5th Cir. 1975)).

113. *See id.* at 610.

Miranda warnings have been given.[114] Other decisions in the Supreme Court have distinguished *Doyle* by pointing out that the silence in *Doyle* came after *Miranda* warnings and that the *Miranda* warnings contain an implicit assurance that the defendant's silence will not be used against him.[115] These decisions argue that this assurance is not present if the *Miranda* warnings have not been given.[116]

4. Silence on the Witness Stand/Refusal to Testify

In addition to holding that the prosecution may not use a defendant's post-arrest silence to imply guilt, the Supreme Court has also held that the prosecution may not use a defendant's silence at trial to imply guilt.[117] In *Griffin v. California*,[118] the Court held that the Fifth Amendment forbids the prosecution in a criminal case from commenting on the defendant's failure to testify at trial and from using such silence as evidence of the defendant's guilt.[119]

In *Griffin*, a California jury convicted the defendant of murder in the first degree.[120] The defendant refused to testify at the trial on the issue of guilt.[121] The trial court instructed the jury that although the defendant had a constitutional right to refuse to take the stand, the jury could take this failure to deny or explain evidence into consideration in determining whether such evidence was true.[122] The court further

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114. *See* United States v. Nunez-Rios, 622 F.2d 1093 (2d Cir. 1980); Bradford v. Stone, 594 F.2d 1294 (9th Cir. 1979); United States v. Impson, 531 F.2d 274 (5th Cir. 1973). In *United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981), the court implied that these decisions may have to be reconsidered in the light of the Supreme Court's decision in *Jenkins v. Anderson*. *See supra* Part II.E.1.

115. Anderson v. Charles, 447 U.S. 404 (1980); Roberts v. United States, 445 U.S. 552 (1980).

116. *Anderson*, 447 U.S. at 404.

117. *See* Griffin v. California, 380 U.S. 609, 615 (1965).

118. 380 U.S. 609 (1965).

119. *See id.* The rationale for protecting the defendant's right not to be compelled to take the stand in his own defense was explained in *Wilson v. United States*, 149 U.S. 60 (1893). The *Wilson* Court pointed out that even an innocent defendant may be understandably reluctant to testify in his defense. *See id.* The defendant may confuse the issues and embarrass himself on the stand through nervousness, timidity, or attempting to explain suspicious events. *See id.* This may increase prejudice against him rather than remove it. *See id.*

120. *See Griffin* at 609. The defendant was sentenced to death and the California Supreme Court upheld the conviction. *See id.* at 611.

121. *See id.* at 609. The defendant did testify at a separate trial held to decide his sentence. *See id.*

122. *See id.* at 609-10. Article I, section 13 of the California Constitution at that time stated, in part, "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the

instructed the members of the jury that they could conclude that the more probable inferences which could be drawn based on the defendant's failure to testify were those unfavorable to the defendant.[123] Additionally, the prosecution commented on the defendant's failure to take the stand.[124] The Supreme Court reversed the conviction, holding that the Fifth Amendment forbids comment by both the prosecution and the court that a defendant's failure to testify is evidence of guilt.[125] However, the *Griffin* Court did not address the issue of whether the Fifth Amendment also prohibits prosecutorial comments about silence which occurs in a pre-trial situation.[126]

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court or the jury." *Id.* at 610 n.2 (quoting CAL. CONST. ANN. art. I, § 13 (repealed Nov. 5, 1974)). The Court held that this provision violated the Fifth Amendment. *See id.* at 613. The Court recognized that forty-four states had laws prohibiting comment on the defendant's failure to testify. *See id.* at 611 n.3.

123. *See id.* at 610. Specifically, the trial court had instructed the jury:

> As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

Id. (quoting the trial court's jury instructions).

The trial court had added that the defendant's failure to explain or deny does not create a presumption of guilt. *See id.* The court also stated that no inferences unfavorable to the defendant could be drawn as to evidence regarding matters of which the defendant had no knowledge. *See id.*

124. *See id.* at 611. The defendant had been seen with the victim the night of her death and evidence placed him in the alley where her body was found. *See id.* at 610. The prosecutor commented:

> He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber . . . because he was conscious of his own guilt and wanted to get away from that damaged or injured woman. These things he has not seen fit to take the stand and deny or explain. And in the whole world, if anybody would know, this defendant would know. Essie Mae is dead, she can't tell you her side of the story. The defendant won't.

Id. at 611 (quoting the trial court prosecutor).

125. *See id.* at 615. In order to determine whether remarks by the prosecution or the prosecution's witness amount to comments on the defendant's silence, in violation of the fifth amendment, two alternative tests have been proposed. *See* United States v. Shaw, 701 F.2d 367, 381 (5th Cir. 1983). First, the court may ask whether the manifest intent of the remark is to comment on the defendant's silence. *See id.* at 381. Alternatively, the court may ask if the nature of the remark is such that a jury would "naturally and necessarily" construe the statement as a comment on the defendant's silence. *Id.*

126. *See Griffin*, 380 U.S. 609. The Court reserved decision as to whether an accused could require the court to instruct the jury that his silence must be disregarded. *Id.* at 615

III. DISCUSSION

A. The Split Among the Circuit Courts

Although the Supreme Court has not addressed the issue of admissibility of prosecutorial comments on pre-arrest silence to imply guilt, several of the circuit courts have been faced with the issue. However, their treatment of the issue has been inconsistent, with some circuits allowing such comments and some not.[127] At least one circuit faced with the issue for the first time was reluctant to establish a rule due, in part, to this variation in treatment.[128] Thus, the circuit split has grown because of the various circuit courts' failure to establish a uniform rule.

1. Eleventh and Fifth Circuits Allow Comments on Pre-Arrest Silence

Courts in the Eleventh Circuit have consistently held that the Fifth Amendment is not violated by prosecutorial comments on silence at trial if the silence occurs before arrest.[129] For example, in *United States v. Rivera*,[130] the court held that the government may comment on a defendant's silence before *Miranda* warnings in an attempt to imply guilt without violating the Fifth Amendment.[131]

In *Rivera*, the defendants were questioned by customs agents concerning suspected drug smuggling after a flight from Columbia.[132]

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127. The Fifth and Eleventh Circuits have allowed the prosecution to comment on pre-arrest silence. *See* United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (determining that the statement in question was not about the defendant's silence, but was instead about his "failure to connect his claimed duress to his decision to transport drugs into the United States"); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991); United States v. Carter, 760 F.2d 1568, 1577 (11th Cir. 1985). The First, Seventh, and Tenth Circuits have not allowed the prosecution to use pre-arrest silence to imply guilt. *See* United States v. Burson, 952 F.2d 1196, 1200-01 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562, 1567-68 (1st Cir. 1989); United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 2017-18 (7th Cir. 1987).

128. *See* United States v. Thompson, 82 F.3d 849, 855-56 (9th Cir. 1996). For a discussion of the *Thompson* case, see *supra* Part I.

129. *See Rivera*, 944 F.2d at 1568; *Carter*, 760 F.2d at 1577; United States v. Nabors, 707 F.2d 1294, 1300 (11th Cir. 1983); United States v. Riola, 694 F.2d 670, 673 (11th Cir. 1983).

130. 944 F.2d 1568 (11th Cir. 1991).

131. *See id.* 1568. The court held such silence could be used by the prosecution whether it came before or after arrest. *See id.*

132. *See id.* at 1565. The defendants were stopped by a Customs Inspector after arriving at Miami International Airport from Columbia. *See id.* Due to several suspicious circumstances surrounding the group, the Customs Inspector questioned the

At trial, the inspector testified as to the defendants' silence and deadpan reactions to the situation both before and after arrest and *Miranda* warnings.[133] In addition, the prosecutor commented in her closing argument that the group had been "consistently indifferent" throughout the encounter and asked the jury to infer that this had been a pre-arranged response among the group in case they were apprehended.[134] The defendants contended that the use of their silence as evidence violated their constitutional rights.[135]

The Eleventh Circuit first held that the comment about the silence that occurred after the reading of the *Miranda* rights raised a substantial question as to its constitutionality, but found that any prejudice flowing from such a violation would have been harmless error.[136] The court reasoned that when the government has induced the defendant's silence by assuring him that he has the right to remain silent in the *Miranda* warnings, the prosecution cannot fairly use that silence against him.[137] The court then held that the comments about the silence that occurred before *Miranda* warnings did not raise constitutional difficulties.[138] Citing *Jenkins v. Anderson*,[139] the court

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group and inspected their luggage at the airport. *See id.* The agent found a large amount of cocaine hidden in false bottoms of the defendants' suitcases. *See id.* The agent also found cocaine in false hairspray cans. *See id.* at 1566.

133. *See id.* at 1567. The customs agent testified that when he opened the false bottoms of the suitcases and found the cocaine in front of the defendants, "the [defendants] showed no surprise, agitation, or protest." *Id.* at 1565. The agent described the defendants reactions as "deadpan" and testified that "[n]othing verbal was said." *Id.* at 1567 n.9.

134. *Id.* at 1567.

135. *See id.* The defendants argued that the agent's testimony and the prosecutor's comments were a direct comment on their silence. *See id.* at 1568. The government claimed, however, that the prosecutor did not "comment on the defendants' silence, but only on their mannerisms and demeanor." *Id.* The court cited *United States v. Elkins*, 774 F.2d 530, 537 (1st Cir. 1985), for the proposition that comments on silence also occur when the prosecution's references to silence are more oblique than simply a direct statement that the defendant failed to answer questions. *See Rivera*, 944 F.2d at 1568 n.13.

136. *See Rivera*, 944 F.2d at 1569. The court discussed the difficulty of drawing a distinction between comments that the defendant is "being silent" and that the defendant is "acting silent." *Id.* at 1568. The court recognized that to accept the government's position that the prosecution's comments were not comments on silence might put future defendants in the position of having to express their innocence nonverbally through "flailing arms [and] shaking heads" to prevent the government from drawing negative inferences from a defendant's passive silence. *Id.* at 1569. Ultimately, the court avoided deciding this issue, holding that any prejudice resulting from the comments was harmless beyond a reasonable doubt. *See id.* at 1570.

137. *See id.* at 1567.

138. *See id.*

139. 447 U.S. 231 (1980). See *supra* text accompanying notes 81-93 for a

stated that the government may comment on a defendant's silence if it occurs before he is arrested and given *Miranda* warnings.[140] Additionally, the court cited *Fletcher v. Weir*[141] for the proposition that the government may also comment on silence if it occurs after arrest but before *Miranda* rights.[142] The *Rivera* court failed to point out, however, that the silence in *Jenkins* and *Fletcher* was used for impeachment purposes, whereas silence was used to imply guilt in *Rivera*.[143] Thus, the only comments on silence which are impermissible in the Eleventh Circuit are comments on silence occurring after *Miranda* warnings have been given.

The rationale the *Rivera* court used in allowing comments on a defendant's silence before arrest was followed in *United States v. Simon*.[144] In *Simon*, a police officer was involved in an armed robbery and murder and repeatedly refused to produce his firearm to the government for ballistics testing, asserting his Fifth Amendment privilege against self-incrimination.[145] At trial, the prosecution commented several times in their closing argument on the defendant's failure to produce the gun in order to prove his guilt.[146] In holding that

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discussion of *Jenkins*.

140. *See Rivera*, 944 F.2d at 1568. The prosecutor in *Rivera* used the defendant's silence before arrest to imply that the defendant was guilty, not for impeachment purposes. *Id.* In *Jenkins*, silence was used for impeachment purposes. *Jenkins*, 447 U.S. at 235.

141. 455 U.S. 603 (1982) (per curiam). See *supra* text accompanying notes 95-98 for a discussion of *Fletcher*.

142. *See Rivera*, 944 F.2d at 1568. The court stated that the vital distinction as to whether comments on silence are admissible is whether *Miranda* warnings have been given. *See id.* Thus, whether the defendant has been taken into custody or arrested did not matter to the court unless the defendant was given some kind of assurance that his silence will not be used against him. *See id.*

143. *See id.* at 1568. The *Jenkins* and *Fletcher* decisions did not extend their holdings to allow the use of pre-arrest silence to imply guilt. *See Jenkins*, 447 U.S. at 235; *Fletcher*, 455 U.S. at 609. The holdings were specifically limited to the use of silence for impeachment purposes. *See Jenkins*, 447 U.S. at 235; *Fletcher*, 455 U.S. at 609.

144. 964 F.2d 1082 (11th Cir. 1992).

145. *See id.* at 1085. The defendant, although he was a police officer, was involved in a scheme to rob a drug dealer. *See id.* at 1083. The officer-defendant did not find drugs or money at the drug dealer's home. *See id.* The defendant did not want to leave behind any witnesses so he killed the drug dealer and his girlfriend. *See id.* The defendant shot both victims eight or nine times with his .22 caliber pistol, but they were still screaming and moving, so he shot them in the back of the head with a .45 caliber pistol. *See id.* After the shooting, the defendant changed his bloody clothes in his car and met his wife and son for a movie. *See id.*

146. *See id.* at 1085. The prosecution attempted to use this silence to show that the defendant had something to hide. *See id.* Although the failure to produce a gun is not silence in the traditional sense of the word, the court said they would treat the failure as if

the defendant's Fifth Amendment privilege was not violated by the prosecution's comments because he had not yet received his *Miranda* warnings, the court stated that use of a defendant's silence or failure to act is admissible as evidence of guilt in the absence of *Miranda* warnings.[147]

Similarly, in *United States v. Carter*,[148] the Eleventh Circuit again held that, in certain circumstances, the prosecution may permissibly comment on a defendant's pre-arrest silence.[149] At trial, a customs agent testified that when asked a question, one of the defendants stated that he wanted to speak with an attorney.[150] The *Carter* court first recognized that such silence can be used to impeach a defendant's own testimony, citing *Jenkins v. Anderson*.[151] The court went on to hold, however, that it was not reversible error for a prosecution witness to testify that during pre-arrest questioning, the defendant stopped answering questions and asked to speak to a lawyer.[152] Accordingly, the court held that this testimony in no way violated the defendant's constitutional right to remain silent.[153]

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it were verbal silence because the failure was covered by the Fifth Amendment privilege against self-incrimination. *See id.* at 1086.

147. *See id.* The court cited *United States v. Rivera*, 944 F.2d 1563 (11th Cir. 1991), for this proposition. *See id.* at 1086.

148. 760 F.2d 1568 (11th Cir. 1985).

149. *See id.* at 1577. Customs officers detected a suspicious aircraft heading for Florida. *See id.* at 1571. They pursued the plane to a secluded grassy airstrip in southern Florida, but the passengers had fled. *See id.* Officials found traces of marijuana in the plane. *See id.* Several persons were eventually apprehended, including defendant Sheehy. *See id.* at 1574.

150. *See id.* Sheehy's passport was found in the airplane. *See id.* When asked why his passport was found in the plane, Sheehy replied that he wanted to speak to an attorney. *See id.*

151. *See id.* (citing Jenkins v. Anderson, 447 U.S. 231 (1980)). The court stated that prejudice was limited since the statement came before arrest. *See id.* Further, the court reasoned that the agent's statement was simply intended to show how and why the conversation between the agent and Sheehy ended. *See id.*

152. *See id.*

153. *See id.* The court also held that the trial court did not err in disallowing the prosecutor's remarks concerning the defendant's refusal to testify at trial. *See id.* at 1578. The prosecutor stated in his closing argument, "You have heard Kevin Sheehy testify - not testify." *Id.* at 1577. The court adopted a two step test from *United States v. Wilson*, 500 F.2d 715, 721 (5th Cir. 1974), to determine when a prosecutor's remark constitutes an impermissible comment on a defendant' failure to take the stand. *See Carter*, 760 F.2d at 1578. According to the *Wilson* test, the court should ask whether the "statement was manifestly intended or was of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Id.* (citing United States v. Carrodeguas, 747 F.2d 1390, 1395 (11th Cir. 1984) (quoting United States v. Wilson, 500 F.2d 715, 721 (5th Cir. 1974))). Applying this test, the *Carter* court held that the prosecutor's remarks were not intended to imply to the jury that the defendant failed to testify; thus, the remarks were permissible. *Id.* The *Carter* court

Like the Eleventh Circuit, the Fifth Circuit has held that prosecutorial use of pre-arrest silence in its case-in-chief to imply guilt does not violate the Fifth Amendment.[154] In *United States v. Zanabria*,[155] for example, the Fifth Circuit allowed both testimony and comments in the prosecution's closing argument concerning the defendant's silence prior to arrest.[156] At trial, the defendant asserted as a defense the explanation that his actions were the result of duress.[157] The prosecution used the defendant's failure to tell this story to the police before arrest to impeach the duress defense.[158]

Although the pre-arrest silence was used in this case to impeach the defendant's duress defense and not to imply his guilt, the court did not conclude that the comments were admissible based on the fact that they were used to impeach the defendant's defense.[159] Instead, the court relied on the theory that the Fifth Amendment protects only against self-incrimination when compelled by the government.[160] Thus, the *Zanabria* holding could be extended to allow any comment on pre-arrest silence, whether used to impeach or to imply the defendant's guilt.

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did not discuss the possibility of using this test to determine whether prosecutorial comments on pre-arrest silence are permissible. *Id.* at 1577. The court also did not explain why this rule does not conflict with the decision in *Griffin v. California*, 380 U.S. 609 (1965). *See id.* at 148 (discussing prosecutorial comments). For a discussion of *Griffin*, see *supra* Part II.E.4.

154. *See* United States v. Zanabria, 74 F.3d 590 (5th Cir. 1996).

155. 74 F.3d 590 (5th Cir. 1996).

156. *See id.* at 593. In *Zanabria*, the police arrested the defendant after they found nearly three kilos of cocaine in his suitcase during a customs search at Houston Intercontinental Airport. *See id.* at 592. The police charged the defendant with possession of cocaine with intent to distribute and unlawful importation. *See id.*

157. *See id.* Zanabria, claiming that he was in financial trouble, had resorted to borrowing money from a loanshark. *See id.* Zanabria received death threats against his eight-year-old daughter if he did not pay off his debt. *See id.* The defendant did not take the stand, but his wife testified that he resorted to illegal activity in order to pay off these debts. *See id.*

158. *See id.* The arresting customs officer testified that prior to his arrest, the defendant did not say anything about the threats against his daughter or his financial problems. *See id.* at 593.

159. The *Zanabria* court did not even cite *Jenkins*, which seemed to be closely on point. *Jenkins* held that the government can use the defendant's pre-arrest silence to impeach the defendant's defense. Jenkins v. Anderson, 447 U.S. 231, 240 (1980). The only difference between *Jenkins* and *Zanabria* is that the defendant did not take the stand in *Zanabria*. *Zanabria*, 74 F.3d at 592. Nonetheless, the court did not follow the reasoning in *Jenkins* and, instead, based its decision on the proposition that the defendant's silence was not compelled by the government and was therefore not protected from comment by the Fifth Amendment. *See id.* at 593. See *supra* Part II.E.1, for a discussion of *Jenkins v. Anderson*, 447 U.S. 231 (1980).

160. *See Zanabria*, 74 F.3d at 593.

2. Circuits Not Allowing Comments

The First, Seventh, and Tenth Circuits have held that the Fifth Amendment privilege against self-incrimination prohibits the prosecution from using a defendant's pre-arrest silence to imply guilt.[161] However, the Seventh Circuit has subsequently held that comment on pre-arrest silence is permissible when a defendant selectively answers an investigator's questions.[162] Therefore, when this Seventh Circuit decision is combined with the decisions in the Eleventh and Fifth Circuits allowing comment on pre-arrest silence in any circumstance,[163] and the decisions in the First and Tenth Circuits disallowing comment on pre-arrest silence,[164] three distinct rules stand regarding the use of pre-arrest silence.

a. First Circuit

In *Coppola v. Powell*,[165] the First Circuit held that a defendant's pre-arrest statement refusing confession was not admissible in the prosecution's case-in-chief.[166] At trial, the trooper who questioned the defendant testified as to the defendant's statement that he would not confess.[167] The trial court allowed the admission of this testimony and the defendant was convicted.[168] Although the testimony in question concerned an affirmative statement by the defendant that he would not confess, rather than silence, the court of appeals ruled that the case should be treated the same as a case in which the prosecution has commented on the defendant's pre-arrest silence because both

161. *See infra* Part III.A.2.

162. *See* United States v. Davenport, 929 F.2d 1169, 1174-75 (7th Cir. 1991) (holding that once the defendants gave an officer their version of events in a non-custodial, voluntary interview, they forfeited their Fifth Amendment privilege). For a detailed discussion of *Davenport*, see *infra* text accompanying notes 199-210.

163. *See supra* Part III.A.1.

164. *See supra* Part III.A.2.

165. 878 F.2d 1562 (1st Cir. 1989).

166. *See id.* at 1568. The defendant in *Coppola* was charged with rape and burglary. *See id.* at 1563. On the day of the crime, state and local police officers went to his residence to question him about the rape. *See id.* One of the officers asked the defendant if he would be willing to talk. *See id.* The defendant replied that he would not confess. *See id.*

167. *See id.* at 1564. The defendant said, "Let me tell you something. I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy." *Id.* The officer also testified that when the defendant was asked if he would talk, he responded in a hostile, bragging tone and stated that he would not talk to the officer without a lawyer. *See id.*

168. *See id.* The trial court did not allow the officer's statement that the defendant asked for a lawyer because of the potential for a severe prejudicial effect on the jury. *See id.* at 1563.

situations involved an invocation of the privilege against self-incrimination.[169]

The *Coppola* court stated that it was unable to find any Supreme Court cases holding, or even suggesting, that a pre-arrest invocation of the Fifth Amendment privilege can be used by the prosecutor in his case-in-chief.[170] Further, the court pointed out that the decision in *Jenkins v. Anderson* applies only to the use of pre-arrest silence to impeach, and not to the use of such silence in the prosecution's case-in-chief.[171] The court stated that the defendant intended to invoke his privilege against self-incrimination, and relied on this Fifth Amendment protection.[172] The court emphasized the fact that the defendant said that he would not confess and followed this with a request for a lawyer.[173] Additionally, the defendant did not later take the stand and try to explain his actions.[174] For these reasons, the court held that the defendant's constitutional rights were violated by the use of the statement in the prosecution's case-in-chief.[175]

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169. *See id.* at 1567. The court also stated that the Fifth Amendment protects the defendant from both testimony and prosecutorial comment on pre-arrest silence. *See id.*

170. *See id.* at 1568. In its analysis, the court referred to three basic legal principles concerning the Fifth Amendment privilege against self-incrimination. *See id.* For a discussion of these three principles, see *supra* Part II.D.

171. *See id.* at 1568.

172. *See id.* The court held that the defendant successfully invoked the Fifth Amendment privilege before it found that the statements made by the agent were inadmissible. *See id.* at 1567. The *Coppolla* court cited *Kastigar v. United States*, 406 U.S. 441, 444 (1972), for the proposition that the Fifth Amendment privilege "is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime." *Coppolla*, 878 F.2d at 1565. Addressing the importance and breadth of the Fifth Amendment, the court also quoted a former Chief Judge of the First Circuit, Magruder:

> Our forefathers, when they wrote this provision into the Fifth Amendment of the Constitution, had in mind a lot of history which has been largely forgotten to-day. [citations omitted]. They made a judgment and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused.

Id. at 1566 (quoting Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1951)).

173. *See id.* at 1568.

174. *See id.* The court found that these facts indicated that the defendant intended to assert the Fifth Amendment privilege. *See id.*

175. *See id.* The court undertook a lengthy analysis to determine if the failure of the trial court to exclude the testimony of the officer was harmless error. *See id.* at 1569-71. The court commented that the case was not one of overwhelming guilt and that it was not clear beyond a reasonable doubt that the jury would have returned a verdict of guilty. *See id.* at 1571. Moreover, there was no conclusive evidence that connected the defendant to the crime. *See id.* For these reasons, the court concluded that the statement may have been the clincher to the jury and held that the error was not harmless. *See id.*

b. Tenth Circuit

The Tenth Circuit has also disallowed prosecutorial use of a defendant's silence prior to arrest or *Miranda* warnings to imply guilt.[176] In *United States v. Burson*,[177] the court held that the admission of testimony that the defendant remained silent when questioned prior to his arrest for tax evasion constituted plain error in violation of the defendant's constitutional rights.[178] Investigators testified in *Burson* that the defendant would not answer their questions.[179] The defendant contended that the use of this testimony as substantive evidence of his guilt was an impermissible comment on his Fifth Amendment right to remain silent.[180]

The court cited *Griffin v. California*[181] for the proposition that once a defendant invokes his Fifth Amendment right to remain silent, at trial, the prosecution may not refer to any circumstances surrounding the defendant's assertion of his Fifth Amendment rights.[182] The court recognized that certain exceptions to this rule exist, such as in the case of impeachment, but found that none of these exceptions applied to the case at hand.[183] Thus, the court held that the admission of the agents' testimony was plain error and in violation of the defendant's Fifth Amendment rights.[184]

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176. *See* United States v. Burson, 952 F.2d 1196 (10th Cir. 1991).

177. 952 F.2d 1196 (10th Cir. 1991).

178. *See id.* at 1201. The defendant in *Burson* was charged with tax evasion. *See id.* at 1198. During its case in chief, the prosecution called as witnesses two IRS agents who testified that they went to defendant's home, prior to arrest, to question the defendant. *See id.* at 1200.

179. *See id.* The agents were asked if the defendants ever responded to their questions, to which they replied, "No." *Id.* The trial court allowed this testimony and the defendant was convicted. *See id.*

180. *See id.*

181. 380 U.S. 609 (1965).

182. *See Burson*, 952 F.2d at 1201. The court stated that the *Griffin* case prevented the prosecution from commenting on any Fifth Amendment rights that the defendant has exercised. *See id.* This statement suggests that the *Burson* court interpreted the *Griffin* case to prohibit any comment on silence, whether it comes before arrest or on the stand. The *Griffin* Court seemed to limit its holding to disallowing comment on the failure to take the stand. *See Griffin*, 380 U.S. at 615.

183. *See Burson*, 952 F.2d at 1201.

184. *See id.* The court held that although the admission did constitute plain error, this error was harmless. *See id.* at 1202. In making this determination, the court outlined five factors used in deciding if comment concerning the defendant's silence constitutes harmless error. *See id.* at 1201. These include: (1) the use to which the prosecution puts the silence; (2) who elected to pursue the line of questioning; (3) the quantum of other evidence indicative of guilt; (4) the intensity and frequency of the reference; and (5) the availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions. *See id.* at 1201 (quoting United States v.

c. Seventh Circuit

Courts in the Seventh Circuit have also disallowed comments by the prosecution concerning the defendant's silence prior to arrest.[185] The decisions, however, have not been entirely consistent.[186]

In *United States ex rel. Savory v. Lane*,[187] the court disallowed comments by the prosecution about the defendant's pre-arrest silence.[188] In *Lane*, a fourteen-year-old defendant was charged with the brutal murder of two of his teenage friends.[189] The State presented evidence that when police first questioned the defendant, a week after the murders, the defendant said that "he didn't want to talk about it, he didn't want to make any statements."[190] The prosecutor emphasized this statement at closing argument.[191]

Massey, 687 F.2d 1348, 1353 (10th Cir. 1982)); Williams v. Zahradnick, 632 F.2d 353, 361-62 (4th Cir. 1980). Applying these factors, the court found the error harmless, because it determined that the jury would have returned a guilty verdict regardless. *See id.*

185. *See* Fencl v. Abrahamson, 841 F.2d 760 (7th Cir. 1988); United States *ex rel.* Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987). For a discussion of *Fencl*, see *infra* notes 195-98 and accompanying text. For a discussion of *Lane*, see *infra* notes 187-94 and accompanying text.

186. *See* United States v. Davenport, 929 F.2d 1169, 1174-75 (7th Cir. 1991) (holding that comment concerning pre-arrest silence is admissible if the defendant begins to answer questions, but then stops). For a discussion of *Davenport*, see *infra* notes 199-210 and accompanying text.

187. 832 F.2d 1011 (7th Cir. 1987).

188. *See id.* at 1018.

189. *See id.* at 1012. Each victim suffered several stab wounds, one of them so severe that her internal organs were exposed. *See id.* The defendant had been at the victims' house the night before the bodies were found. *See id.* A two-year-old child of one of the victims was found, still alive, in the house. *See id.* at 1013. Blood matching the victims' was found on a pair of pants and blood was found on a knife owned by the defendant. *See id.*

190. *Id.* at 1015. The defendant allegedly made several admissions to third parties on the day of the murders. *See id.* at 1013. One witness testified that the defendant told her he had been practicing karate with one of the victims and had "accidentally cut him or something, by accident. But he was all right when he left." *Id.* Another witness testified that the defendant told him he accidentally stabbed one of the victims. *See id.* at 1014. When asked if the defendant said anything about the other victim, the witness replied, "She came in the room and he stabbed her, I guess." *Id.*

191. *See id.* at 1015. The prosecutor made the following statement in his closing argument:

> I believe you heard that on that date of January 25th, 1977, Officers George Pinkney and Edgar Hanes went to the Late Afternoon School to talk to Johnnie Savory, who they thought might have some information regarding the case. They asked him that afternoon about 3:30, they wanted to talk to him about Scopie, what he might know. The Defendant, what did he say at that time, ladies and gentlemen? "I don't want to talk about it. I won't make any statements." This, ladies and gentlemen, the apparent good friend of his, he doesn't want to talk about it, doesn't want to help the police at that time . . . .

The court ruled that the holding in *Griffin*, that the government may not comment on the defendant's silence at trial, applied equally to a defendant's silence before trial, and even before arrest.[192] The court distinguished *Jenkins* and *Fletcher*, in which use of silence was held admissible only for impeachment purposes.[193] Accordingly, the court found that the use of the defendant's silence to imply guilt was "nothing short of incredible, given the language of our constitution and the interpretation it has been consistently given," and held that the trial court erred in allowing the comments.[194]

Furthermore, in *Fencl v. Abrahamson*,[195] the Seventh Circuit held that prosecutorial comments and testimony concerning the defendant's silence during pre-arrest questioning violated the Fifth Amendment.[196] In *Fencl*, the prosecution made a total of six references to the defendant's silence in its opening and closing arguments and during the testimony of the interrogating officer.[197] The Seventh Circuit

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Id. The prosecutor argued that the victim and the defendant had been practicing karate when the victim began to get the best of the defendant. *See id.* At this point, the prosecutor contended, the defendant pulled out his knife and stabbed the victim. *See id.* "He saw what he had done, ladies and gentlemen, and I would suggest to you he went besirk [sic]. If you examine the photographs of the bodies in this case, this is not the act of a sane person at that time." *Id.* at 1015-16.

192. *See id.* at 1017. The court also cited *United States v. Shue*, 766 F.2d 1122, 1130 (7th Cir. 1985), in which the court held that where impeachment by silence is permissible, the prosecution may not also argue that this silence is inconsistent with innocence. *See Lane*, 832 F.2d at 1017. Although *Griffin* dealt with the failure to take the stand, and *Shue* was based on Due Process grounds, the *Lane* court found them applicable to the use of pre-arrest silence to imply guilt. *See id.*

193. *See id.* at 1017-18. The court pointed out that the rule allowing use of silence for impeachment exists because a defendant does not have a constitutional right to perjure himself. *See id.* at 1017. For a discussion of *Jenkins*, see *supra* text accompanying notes 81-93. For a discussion of *Fletcher*, see *supra* text accompanying notes 95-98.

194. *See id.* at 1018. The court nevertheless found that the error was harmless beyond a reasonable doubt in light of the state's overwhelmingly strong case. *See id.* at 1019.

195. 841 F.2d 760 (7th Cir. 1988).

196. *Id.* at 763. In *Fencl*, police were investigating the disappearance of a Wisconsin woman when they found her purse in a plastic bag in a local river. *See id.* at 762. Among the items found in the purse was a parking ticket for the defendant's car. *See id.* When the police questioned the defendant about the parking ticket, he refused to answer and asked to speak with a lawyer. *See id.* The defendant was subsequently charged with first degree murder. *See id.*

197. *See id.* At trial, the investigating officer testified that when initially questioned without *Miranda* warnings, the defendant would not answer and wanted to speak to an attorney. *See id.* The officer also testified that after *Miranda* warnings were read, the defendant would not answer. *See id.* The prosecution also referred to the defendant's silence in its opening and closing arguments. *See id.* The defendant was convicted and sentenced to life in prison. *See id.*

agreed with both the district court and the Wisconsin Supreme Court that the defendant's Fifth Amendment rights were violated by the government's use of his pre-arrest silence to imply guilt.[198]

On the other hand, the Seventh Circuit held in *United States v. Davenport*[199] that the admission of evidence that a defendant refused to answer questions does not violate the Fifth Amendment privilege in limited circumstances.[200] The court held in *Davenport* that once a defendant voluntarily gives an investigator his version of events, he forfeits his privilege not to answer questions concerning the version he has given, and that a prosecutor may use silence to imply guilt in this situation.[201]

In *Davenport*, the defendants began to answer an investigator's questions prior to arrest, but refused to answer certain questions.[202] This selective refusal to answer was used against the defendants in the prosecution's case-in-chief.[203] The Seventh Circuit held that the trial court did not err in admitting the defendants' refusal into evidence, reasoning that once the defendants started answering questions, they forfeited their privilege not to answer questions concerning the information they gave to the investigators.[204] Therefore, the court held

198. *See id.* at 765. The court agreed with the district court that any error resulting from the allowance of comment on the defendant's pre-arrest, pre-*Miranda* silence was harmless error. *See id.* at 769.

199. 929 F.2d 1169 (7th Cir. 1991).

200. *Id.* at 1174-75.

201. *See id.* A jury convicted the Davenports of having violated 31 U.S.C. § 5324(3), which prohibits structuring a cash transaction with a bank in order to prevent the bank from filing currency transaction reports. *See id.* at 1171 (31 U.S.C. § 5324(3) (1986)). The Davenports received approximately $100,000 and deliberately made several small deposits to the bank in order to avoid having the bank report the transactions to the IRS. *See id.* Prior to arrest, the Davenports were questioned by federal agents about the violation. *See id.* The agents did not place the Davenports in custody at that time and told them that they did not have to answer any questions. *See id.*

202. *See id.* Prior to arrest, the Davenports were questioned by federal agents about the violation. *See id.* The agents did not place them in custody at this time. *See id.* The Davenports began to answer questions, then refused to continue. *See id.* Mrs. Davenport told the agents that they had received the money in inheritance upon her husband's father's death. *See id.* Mr. Davenport claimed that the money was found in a safe in his father's house. *See id.* Evidence at trial established, however, that the father had been living in a car for six months prior to his death, died in poverty, and had been buried at public expense. *See id.*

203. *See id.* at 1174-75. One of the questions Mrs. Davenport refused to answer was "what her father-in-law's name was." *Id.* at 1175.

204. *See id.* at 1174-75. The court stated that to prohibit the comment "'would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony.'" *Id.* at 1174 (quoting Rogers v. United States, 340 U.S. 367, 371 (1951)). The court also stated that even if the admission of this evidence was error, it would have been harmless beyond a reasonable doubt. *See id.* at 1175.

that the defendants forfeited their right to object to statements on their refusal to answer these questions.[205] The court reasoned that the present situation was similar to the use of pre-arrest silence to impeach a defendant who has taken the stand in his own defense.[206] The court ruled that the privilege against self-incrimination should not be used to gain an advantage in the criminal process by selectively answering questions.[207]

Additionally, the court distinguished *Miranda v. Arizona*.[208] The court recognized that *Miranda* holds that a defendant does not waive the constitutional privilege against self-incrimination by answering questions and then "clam[ming] up," but stated that the *Miranda* decision only applied to the coercive setting of a custodial interrogation and not to pre-arrest interrogation.[209] For these reasons, the court held that, when removed, from the coercive environment of a custodial interrogation, a defendant's "willingness to answer some questions can properly be given greater weight in deciding whether that willingness should forfeit the right to object to comment on a refusal to answer a particular question."[210]

B. Result of the Split

The variation in treatment of comments on pre-arrest silence among the circuit courts and the absence of controlling Supreme Court

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205. *See id.* at 1174-75. Specifically, the court stated:

> The privilege against self-incrimination is not a privilege to attempt to gain an advantage in the criminal process, whether in its investigatory or its trial stage, by selective disclosure followed by a clamming up. Having voluntarily given the agent their version of the events, the Davenports forfeited their privilege not to answer questions concerning that version.

Id.

206. *See id.* at 1174. The court stressed that a witness who "makes an incriminating statement cannot use the privilege against compulsory self-incrimination to block cross-examination . . . ." *Id.* The court compared this principle with the present situation where the defendant began to answer an investigator's questions and then clammed up. *See id.*

207. *See id.* at 1174-75.

208. *See id.* at 1175 (citing Miranda v. Arizona, 384 U.S. 436 (1966)). The court recognized that *Miranda* drew a sharp distinction between a witness at trial and a defendant being questioned in custody. *See id.* Nevertheless, the court found the *Miranda* decision inapplicable because the *Davenport* case did not involve a custodial interrogation. *See id.*

209. *See id.* The court reasoned that the *Miranda* Court's emphasis was on the coercive features of a custodial interrogation and was not intended to apply to a non-coercive pre-arrest situation. *See id.*

210. *See id.* The court stated that it did not consider the doubts created by *Miranda* to be fatal to their position. *See id.*

precedent has resulted in significant confusion among the circuits.[211] In *United States v. Thompson*,[212] the Ninth Circuit held that the trial court's admission of a comment on the defendant's silence in the prosecution's closing argument was not plain error.[213] In *Thompson*, the defendant shot and killed a man in his house during an alleged drug deal.[214] When the police arrived, they did not arrest the defendant, but instead, questioned him.[215] The defendant began to cooperate, but eventually refused to answer certain questions, stating he was scared and wanted to speak with an attorney.[216] At trial, the detective testified about the defendant's refusal to answer and his requests for an attorney.[217] In the final remarks of his closing argument, the prosecutor emphasized the detective's testimony, implying that it was indicative of the defendant's guilt.[218]

The Ninth Circuit had never addressed the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt.[219] The court noted that it was not allowed to reverse for plain error if the issue was not

211. *See, e.g.*, United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996) (holding that the defendant's silence was not protected under the Fifth Amendment as the silence was not induced by a government agent and was not in response to a government agent's questions); United States v. Thompson, 82 F.3d 849, 856 (9th Cir. 1996) (holding that due to the lack of controlling authority and the current circuit court split on the issue, the court could not find "plain error" in the trial court's failure to exclude evidence of pre-arrest silence); United States v. Davenport, 929 F.2d 1169 (7th Cir. 1991) (holding that outside the coercive setting of a custodial interrogation, willingness to answer some questions can properly be given greater weight in deciding whether the willingness forfeits the right to object to comment on a refusal to answer a particular question), *cert. denied*, 502 U.S. 1031 (1992); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (holding that the government may comment on a defendant's silence if it occurs before arrest and before *Miranda* warnings or after arrest but before *Miranda* warnings); United States v. Blankenship, 746 F.2d 233, 239 (5th Cir. 1984) (holding that the government may use a defendant's silence against him when such silence occurs prior to arrest or indictment and at a time when the defendant is not in custody); United States v. Caro, 637 F.2d 869, 876 (2d Cir. 1981) (noting that *Jenkins* may not allow the prosecution to use evidence of pre-arrest silence, but declining to decide the issue as any error resulting from the introduction of the defendant's silence was harmless beyond a reasonable doubt).

212. 82 F.3d 849 (9th Cir. 1996).

213. *See id.* at 856. For a quote of the prosecutor's comment, see *supra* text accompanying note 11.

214. *See id.* at 851.

215. *See id.*

216. *See id.*

217. *See id.* at 854.

218. *See id. See supra* note 11 and accompanying text.

219. *See Thompson*, 82 F.3d at 855. *See also* United States v. Calise, 996 F.2d 1019, 1022 (9th Cir. 1993) (stating that the court need not address the issue as the trial court gave curative instruction telling jury not to consider silence as evidence of guilt).

clear under current law.[220] Citing the lack of controlling authority in both the Ninth Circuit and the Supreme Court, and the significant split among the circuits, the court concluded that the law surrounding the use of pre-arrest, pre-*Miranda* silence as substantial evidence of guilt was too unclear to permit a finding of plain error.[221] Therefore, the defendant's conviction was upheld.[222]

C. Refusal of the Supreme Court to Clarify the Issue

The Supreme Court has never addressed the use of pre-arrest, pre-*Miranda* silence in the prosecution's case-in-chief as substantive evidence of guilt.[223] In *Jenkins v. Anderson*,[224] the Court expressly refused to decide whether such use violated a defendant's Fifth Amendment privilege.[225] Several petitions for certiorari have been

220. *See Thompson*, 82 F.3d at 856. The court stated that it was bound by the Supreme Court's decision in *United States v. Olano*, 507 U.S. 725, 734 (1993). *See id.* The *Olano* Court held that one of the "limitations on appellate authority under Rule 52(b) is that the error be 'plain.'" *Olano*, 507 U.S. at 734 (stating that "'plain' is synonymous with 'clear' or, equivalently, 'obvious'"). The court stated that "[a]t a minimum, the Court of Appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law." *Thompson*, 82 F.3d at 855 (quoting *Olano*, 507 U.S. at 734).

221. *See id.* at 856. "Because of the circuit split, the lack of controlling authority, and the fact that there is at least some room for doubt about the outcome of this issue, we cannot brand the court's failure to exclude the evidence 'plain error.' We do not intend by this result to express any opinion about the constitutionality of the prosecutor's actions." *Id.*

222. *See id.*

223. *See id.* at 855. "There is no controlling Supreme Court precedent." *Id.* The *Thompson* court pointed out that the Supreme Court cases coming closest to deciding the issue were *Griffin*, which held that the Fifth Amendment prohibits a prosecutor from commenting on an accused silence where the accused had refused to testify, and *Jenkins*, which held that a prosecutor may use pre-arrest silence for impeachment purposes. *See id.* (citing *Griffin v. California*, 380 U.S. 609 (1965); *Jenkins v. Anderson*, 447 U.S. 231 (1980)). However, neither of these cases addressed the use of pre-arrest silence for the purposes of implying guilt. *See id.*

224. 447 U.S. 231 (1980).

225. *See id.* at 236 n.2. The Court stated:

> Our decision today does not consider whether or under what circumstances pre-arrest silence may be protected by the Fifth Amendment. We simply do not reach that issue because the rule of *Raffel* clearly permits impeachment even if the pre-arrest silence were held to be an invocation of the Fifth Amendment right to remain silent.

Id. (citing Raffel v. United States, 271 U.S. 494 (1926)). The *Raffel* rule to which the *Jenkins* Court referred provides that when a defendant takes the stand, the prosecution may cross-examine him like any other witness and may ask him about his silence prior to arrest. *See Raffel*, 271 U.S. at 496-97. For a further discussion of *Jenkins*, see *supra* text accompanying notes 81-93.

filed on the issue, but the Court has consistently denied them.[226] Furthermore, the Court has heard challenges to evidentiary use of silence in *Grunewald v. United States*[227] and *United States v. Hale*.[228] In both cases, however, the Court based its decision on the probative value and prejudicial effect of the evidence rather than the Fifth Amendment.[229] This split has left the lower courts to fend for themselves, resulting in great inconsistency in the treatment of the issue.[230]

IV. Analysis

Allowing a prosecutor in a criminal case to imply guilt from a defendant's silence or refusal to answer police questions, is a violation of the Fifth Amendment, whether the silence occurs before or after arrest or *Miranda* warnings.[231] The Fifth Amendment does not provide that its protections are available only to persons in custody.[232] No evidence exists suggesting that the drafters wished to limit this important constitutional protection to persons in custody.[233]

A. Use of Pre-Arrest Silence to Imply Guilt Negates the Value of the Privilege Against Self-Incrimination

The privilege against self-incrimination is "one of the great landmarks in man's struggle to make himself civilized."[234] The right to remain silent, which is derived from this privilege and which is recognized as one of the most important constitutional rights,[235] will have little value if this silence can later be used against a defendant at

226. *See, e.g.*, United States v. Calise, 996 F.2d 1019 (9th Cir. 1993); United States v. Burson, 952 F.2d 1196 (10th Cir. 1991); United States v. Davenport, 929 F.2d 1169 (7th Cir. 1991); Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989).

227. 353 U.S. 391 (1957). For a discussion of *Grunewald*, see *infra* notes 274-75 and accompanying text.

228. 422 U.S. 171 (1955). For a discussion of *Hale*, see *supra* text accompanying notes 108-111.

229. *See Grunewald*, 353 U.S. at 422-24; *Hale*, 422 U.S. at 179-80.

230. *See supra* Part III.A.

231. For a discussion of cases reaching this conclusion, see *supra* Part III.A.2 and *infra* Part IV.C.

232. U.S. CONST. amend. V.

233. *See generally* 8 WIGMORE, *supra* note 22, § 2252, at 324. Specifically, Wigmore states that "[t]he probabilities substantially favor the conclusion that the constitutional protections were originally intended only to prevent return to the hated practice of compelling a person, in a criminal proceeding directed at him, to swear against himself." *Id.*

234. GRISWOLD, *supra* note 26, at 7.

235. *See id.* at 7-9.

trial.[236] A defendant cannot feel free to exercise his Fifth Amendment right to remain silent if the prosecution is allowed to use this silence against him and imply that he is guilty.[237] For the privilege against self-incrimination to serve the purposes it was designed to serve, the right to remain silent must carry with it the assurance that the silence will later not be used against the defendant at trial.[238]

If the prosecution is allowed to imply guilt from a defendant's silence in criminal trials, silence would essentially amount to an admission of guilt; no intelligent defendant would remain silent before arrest.[239] Such a policy would remove the protections of the Fifth Amendment from persons not in police custody.[240] This result is contrary to Supreme Court precedent.[241] According to the Court in *Kastigar*, the right to remain silent "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory . . . ."[242] *Kastigar* thus extends the privilege to persons who are being questioned before arrest.[243]

The holding in *Griffin v. California*[244] prohibiting comment on a defendant's failure to testify should also be extended to prohibit comment on silence before trial.[245] As interpreted by the Supreme

236. For a discussion of cases reaching this conclusion, see *supra* Part III.A.2.

237. *See generally* Jenkins v. Anderson, 447 U.S. 231, 236 (1980) (noting that "[i]t can be argued that a person facing arrest will not remain silent if his failure to speak later can be used to impeach him").

238. *See infra* Part IV.C. Very few defendants exercising the right to remain silent before arrest and before trial know that their silence could be used against them, or that they would ever be charged in a criminal trial at which their silence would even be relevant. *See* Poulin, *supra* note 6, at 210.

239. *See* Coppola v. Powell, 878 F.2d 1562, 1566 (1st Cir. 1989). "Any refusal to speak, no matter how couched, in the face of police interrogation, raises an inference that the person being questioned probably has something to hide." *Id.*

240. *See id.*

241. *See* Kastigar v. United States, 406 U.S. 441, 444 (1972) (holding that the Government may compel a witness to testify by conferring immunity from use of compelled testimony in subsequent criminal prosecutions).

242. *Id.*

243. *See id.*; *see also* United States v. Burson, 952 F.2d 1196, 1200 (10th Cir. 1991) (holding that the admission of testimony that the defendant remained silent when questioned prior to his arrest for tax evasion constituted plain error in violation of the defendant's constitutional rights); Coppola v. Powell, 878 F.2d 1562, 1565 (1st Cir. 1989) (holding that a defendant's pre-arrest statement refusing confession was not admissible in the prosecution's case-in-chief); United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) (holding that the government may not comment on a defendant's silence before trial even before arrest). For a discussion of *Burson*, *Coppola*, and *Lane*, see *supra* Part III.A.2.

244. 380 U.S. 609, 615 (1965).

245. *See* United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991) (citing Griffin v. California, 380 U.S. 609 (1965) (citing *Griffin* for the proposition that "once

Court, the Fifth Amendment contains two privileges—the privilege to refrain from taking the stand in defense and the privilege to refrain from answering questions.[246] *Griffin* protected the right to refrain from taking the stand from prosecutorial comment.[247] The Court should similarly protect the privilege to refrain from answering questions, whether the invocation of the right comes before or after arrest or *Miranda* warnings.[248] The prejudice resulting from comments on pre-arrest silence is arguably greater than the prejudice resulting from comments on the failure to take the stand.[249] The jury can observe for itself that the defendant failed to take the stand and is free to draw its own inferences about this failure without any comments from the prosecution.[250] Thus, little additional burden results when the prosecutor comments on that silence.[251] On the other hand, the jury is completely unaware of the defendant's pre-arrest silence unless evidence of that silence is permitted to be entered at trial.[252]

B. Whether Silence Comes Before or After Miranda Warnings Should be Irrelevant

The prosecution should not be allowed to use the defendant's silence to show guilt regardless of whether the silence occurs before or after *Miranda* warnings have been given. The Fifth Amendment does not provide that no person shall be compelled in any criminal case to be a witness against himself *unless he has not been read his Miranda*

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a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which defendant exercised"). See *supra* Part III.A.2. for further discussion of cases in the United States Court of Appeals reaching this conclusion.

246. *See, e.g.*, Kastigar, 406 U.S. at 444.

247. *See Griffin*, 380 U.S. at 615.

248. *See supra* Part III.A.2.

249. *See* United States v. Hale, 422 U.S. 171, 180 (1975) (holding that the probative value of the defendant's post-arrest silence was outweighed by the prejudicial effect of admitting it into evidence).

250. *See Griffin*, 380 U.S. at 621 (Stewart, J., dissenting) (Justice Stewart wrote: "It is not, as I understand the problem, that the jury becomes aware that the defendant has chosen not to testify in his own defense, for the jury will, of course, realize this quite evident fact, even though the choice goes unmentioned.").

251. *See id.* at 620-21 (Stewart, J., dissenting).

> Since comment by counsel and the court does not compel testimony by creating such an awareness, the Court must be saying that the California constitutional provision places some other compulsion upon the defendant to incriminate himself, some compulsion which the Court does not describe and which I cannot readily perceive.

Id. at 621.

252. *See* Poulin, *supra* note 6, at 210.

rights.[253] No evidence exists that the drafters of the Constitution intended to limit the full protections of the Fifth Amendment to persons in custody or persons informed of their rights.[254] Furthermore, the refusal to apply the Fifth Amendment to proceedings occurring before arrest is contrary to Supreme Court precedent.[255] For example, the Court in *Kastigar v. United States* extended the privilege to persons who are being questioned before arrest during an investigation.[256]

One of the principal reasons given in *Miranda v. Arizona* for the requirement that a defendant be read his rights before questioning is that the custodial interrogation process contains "inherently compelling pressures" that weaken the accused's power to resist and which compel him to speak.[257] Arguably, these pressures are present in a non-custodial, pre-arrest situation as well. A person being questioned by police in connection with a crime may be very fearful that if he does not cooperate, he will be arrested and prosecuted. This fear may compel him to speak when he otherwise would not do so. In fact, a person may feel more compelled to speak before arrest, when he knows that if he does not cooperate he may be arrested, than after arrest when he has been told he may remain silent. Furthermore, interrogators can use the same techniques of persuasion and compulsion both before and after arrest.[258]

The great emphasis placed on the reading of *Miranda* warnings by the Supreme Court in *Doyle v. Ohio*[259] and *Fletcher v. Weir*[260] is misplaced. These decisions reason that the *Miranda* warnings contain an implicit assurance that the defendant's silence will not be used against him.[261] Thus, they reason that it is a violation of the Fifth Amendment for the defendant's silence to be used against him, where the warnings may have encouraged the silence.[262]

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253. *See* U.S. CONST. amend. V.

254. *See* 8 WIGMORE, *supra* note 22, § 2252, at 324. *See also supra* note 223 (quoting Wigmore's conclusion that the drafters of the Constitution did not intend to limit Fifth Amendment protection to persons in custody).

255. *See Kastigar v. United States*, 406 U.S. 441, 444 (1972).

256. *See id.* The Court stated that the Fifth Amendment privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, *investigatory* or adjudicatory." *Id.* (emphasis added).

257. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

258. *See supra* note 67 (discussing the coercive nature of custodial interrogations).

259. 426 U.S. 610 (1976). For a further discussion of *Doyle*, see *supra* text accompanying notes 102-07.

260. 455 U.S. 603 (1982) (per curium). For a further discussion of *Fletcher*, see *supra* text accompanying notes 95-98.

261. *See Doyle*, 426 U.S. at 617-18; *Fletcher*, 455 U.S. at 606.

262. *See Doyle*, 426 U.S. at 617-18; *Fletcher*, 455 U.S. at 606-07. The *Doyle* and

The *Doyle* and *Fletcher* decisions fail to recognize that the assurance that a defendant's silence will not be used against him is present even if the *Miranda* warnings have not been read.[263] Most Americans can recite the *Miranda* warnings by heart from having heard them repeatedly on television.[264] Thus, a defendant already knows that he has the right to remain silent before he is told, and undoubtedly believes that his silence could not be used against him even if *Miranda* warnings are never read.[265] A defendant's silence should not be used against him in a situation where he reasonably relies on the belief that his silence will not be used against him. The possibility that a defendant's silence could be used against him would certainly influence his decision to remain silent.[266]

C. *Use of Silence to Imply Guilt Violates the Functions of the Fifth Amendment*

The Fifth Amendment privilege protects defendants from being forced to incriminate themselves.[267] The privilege forces the government to obtain, from other sources, sufficient evidence to prove the defendant's guilt beyond a reasonable doubt.[268] If the government is allowed to rely on the use of the defendant's silence as evidence of guilt, it obtains an admission by silence.[269] To transform the defendant's silence into a testimonial admission and substitute it for the testimonial admission that the government was unable to obtain undermines the Fifth Amendment's policy of placing the entire burden of proof upon the State.[270]

Fletcher decisions seem to be saying that the defendant's Fifth Amendment rights do not arise until the *Miranda* warnings are read.

263. *See Doyle*, 426 U.S. at 617-18; *Fletcher*, 455 U.S. at 606.

264. *See* United States v. McCrary, 643 F.2d 323, 330 n.11 (5th Cir. 1981). The court noted that *Miranda* "warnings are well established and mechanical in nature. Most ten year old children who are permitted to stay up late enough to watch police shows on television can probably recite them as well as any police officer." *Id.* The defendant who is not familiar with the *Miranda* warnings needs a lot more help than the Fifth Amendment can give him.

265. *See id.*; *see also* Poulin, *supra* note 6, at 210 (noting that "[f]ew defendants exercising the privilege before trial would know that their silence could be used as evidence, or that there would ever be a criminal trial at which their silence might be relevant").

266. *See* Poulin, *supra* note 6, at 210.

267. *See* 8 WIGMORE, *supra* note 22, § 2263, at 379 (stating "[i]t is not merely any and every *compulsion* that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial* compulsion").

268. *See* Poulin, *supra* note 6, at 210-11.

269. *See id.* at 211.

270. *See id.* at 210-11.

Allowing the prosecution to use a defendant's silence to imply guilt also violates the Fifth Amendment's function of protecting the innocent.[271] For example, a defendant charged with murder may have killed in justifiable self-defense.[272] If the defendant is afraid that the police will not believe his story, or feels morally responsible for the death, he may claim the Fifth Amendment privilege and refuse to answer questions prior to arrest.[273] To allow this silence to be used to show the defendant's guilt would defeat the important Fifth Amendment purpose of protecting the innocent.[274] Those who would allow the prosecution to imply guilt from silence assume that those who remain silent are guilty, which is not only frequently untrue, but also inconsistent with the Fifth Amendment's policy of protecting the innocent.[275]

Finally, policy behind the privilege against self-incrimination is to prevent defendants from being subjected to the "cruel trilemma" of self-accusation, perjury, and contempt.[276] When a defendant's silence is used to imply his guilt, a "new trilemma" results: (1) the defendant may make a self-accusation by affirmative statement; (2) he may make

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271. *See id.* at 212.

272. *See* GRISWOLD, *supra* note 26, at 9. Griswold used this example to illustrate the policy of the Fifth Amendment privilege to protect the innocent. *See id.*

273. *See* Poulin, *supra* note 6, at 212.

274. *See* Grunewald v. United States, 353 U.S. 391 (1957). The Court in *Grunewald* held that an implication of guilt could not be drawn from the fact that the defendant invoked the right to remain silent before a grand jury, and that this silence was not a proper subject of cross-examination of the defendant. *See id.* at 421. The *Grunewald* Court stated that:

> Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect *innocent* men. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.

Id. (citations omitted).

275. *See id. See also* Slochower v. Bd. of Higher Educ., 350 U.S. 551, 557-58 (1956). The Court stated:

> The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury . . . . [A] witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.

Id. (citing Ullmann v. United States, 350 U.S. 422, 426-28 (1956); GRISWOLD, *supra* note 26, at 19-21).

276. *See* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964).

a self-accusation by silence; or (3) he may perjure himself.[277] Therefore, if the accused is not allowed to remain silent without worrying that his silence will be used against him, he has an extremely unattractive choice—he may either incriminate himself or perjure himself.[278] In this situation, the defendant does not have the option of suffering the penalty of contempt rather than incriminating himself.[279]

D. Probative Value of Silence is Low, While Prejudicial Effect is High

The probative value of pre-arrest silence, when used to imply the defendant's guilt, is extremely low.[280] Mere silence, whether it comes before or after arrest, is ambiguous and does not necessarily make it more probable than not that the defendant is attempting to hide something, or is guilty.[281] Several innocent explanations may exist for the silence.[282] First, the defendant may have remained silent out of fear or intimidation resulting from an hostile and unfamiliar situation.[283] Being questioned by the police under the threat of arrest and prosecution can be just as frightening and intimidating as a custodial interrogation. Second, the defendant may have remained silent to protect someone else.[284] Third, an innocent defendant may have been advised by his attorney to remain silent.[285] Fourth, the defendant, in these emotional and confusing circumstances, may not have heard or fully understood the question.[286] Likewise, the accused may not have remembered certain events at the time he was questioned or may not have felt they were significant. Finally, the defendant may reasonably believe that he has the right to remain silent, and that his silence cannot and will not be used against him.[287] His silence may be nothing more than an exercise of his *Miranda* rights, which he has

277. *See* Poulin, *supra* note 6, at 211.

278. *See id.*

279. *See id.*

280. *See* United States v. Hale, 422 U.S. 171, 176 (1975). Justice Marshall wrote, "In most circumstances silence is so ambiguous that it is of little probative force." *Id.*

281. *See* Doyle v. Ohio, 426 U.S. 610, 617 (1976). The *Doyle* Court called post-arrest silence "insolubly ambiguous." *Id.*

282. *See Hale*, 422 U.S. at 176. The Court stated, "In light of the many alternative explanations for his pretrial silence, we do not think it sufficiently probative of an inconsistency with his in-court testimony to warrant admission of evidence thereof." *Id.*

283. *Id.* at 177.

284. *See id.*

285. *See* Poulin, *supra* note 6, at 210.

286. *See Hale*, 422 U.S. at 177.

287. *See id.* at 183 (White, J., concurring).

heard dozens of times in television shows and movies.[288] An innocent defendant may believe that remaining silent is wiser than taking the chance of making a mistake and suffering an unjustified arrest and prosecution.[289]

On the other hand, the prejudicial effect of using pre-arrest silence is very high.[290] The Supreme Court recognized the potential for overwhelming prejudicial effect in *Hale* when it pointed out the significant danger that the jury will attach much more weight to the prior silence than is justified.[291] Allowing the defendant to explain his silence at trial is not sufficient to overcome the negative inference the jury is likely to draw, that the defendant would not have remained silent unless he had something to hide.[292] Since the probative value of pre-arrest silence is low and the potential for prejudice is high, evidence of pre-arrest silence should be excluded when it is used to imply that the defendant is guilty.[293]

E. Pre-Arrest Silence Should Be Admitted for Impeachment Purposes

Unlike the use of silence to show guilt, the use of pre-arrest silence to impeach a defendant's testimony if he takes the stand in his own defense should be permitted, as provided in *Jenkins v. Anderson*.[294] The use of silence for impeachment purposes does not result in the unfairness that is present in the use of silence to imply guilt.[295] The

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288. *See supra* note 260 and accompanying text.

289. *See Hale*, 422 U.S. at 177.

290. *See id.* at 180.

291. *See id.* "We now conclude that the respondent's silence during police interrogation lacked significant probative value and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact." *Id.*

292. *See id.*

293. *See id.* The Court further noted that "[w]hen the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." *Id.* (quoting Shepard v. United States, 290 U.S. 96, 104 (1933)). Aside from any Constitutional considerations, silence could arguably be excluded on a purely evidentiary basis. Rule 403 of the Federal Rules of Evidence provides in relevant part that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." FED. R. EVID. 403.

294. 447 U.S. 231 (1980). For a complete discussion of *Jenkins*, see *supra* text accompanying notes 81-93.

295. *See* United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987). The *Lane* court pointed out that impeachment is designed to detect perjury and that a defendant does not have a constitutional right to perjure himself. Further, the *Lane* court reasoned that the cases which have allowed impeachment by silence have relied on the fact that "the defendant opens himself to impeachment by taking the stand." *Id.* at 1017-18. "In sum, we believe that the state's suggestion that use of a defendant's silence to impeach his trial testimony presents a constitutional issue, but use of his silence to imply guilt does not, is nothing sort of incredible, given the language of our

fundamental difference between using pre-arrest silence to imply guilt and using it to impeach is that the defendant opens the door to impeachment evidence when he takes the stand and gives his version of events.[296] Thus, he should not be able to object if the prosecution cross-examines him about the version he tells the jury.[297]

V. PROPOSAL

Since the use of the defendant's pre-arrest silence in the prosecution's case-in-chief to imply guilt violates the defendant's constitutional rights, and because several circuits are split on the issue,[298] the Supreme Court should grant *certiorari* and resolve the confusion. In cases such as *United States v. Thompson*, courts have refused to overturn convictions based on the use of silence to imply guilt due to the lack of clarity and agreement on the issue among the circuits.[299] This issue demands uniform treatment among all federal and state courts.

The Supreme Court should rule that any prosecutorial comment on a defendant's silence or refusal to answer questions, when used to imply the defendant's guilt, is a violation of the Fifth Amendment privilege against self-incrimination and is therefore improper.[300] The prosecution should not be allowed to comment on silence in its case-in-chief for any reason.[301] Comments in both the opening and closing arguments and testimony on the witness stand about a defendant's silence should be disallowed for the purpose of showing the

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constitution and the interpretation it has been consistently given." *Id.* at 1018.

296. *See Jenkins*, 447 U.S. at 240. *See also Lane*, 832 F.2d at 1017-18 (discussing the difference between these two uses of silence).

297. *See Jenkins*, 447 U.S. at 240. Note, however, that the *Jenkins* Court did state that states were free to formulate evidentiary rules to determine when silence is more probative than prejudicial. *See id.* The Court commented in *Doyle* that "we recognize, of course, that unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination, some defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Doyle*, 426 U.S. at 619 n.7. *See also generally* Fitzpatrick v. United States, 178 U.S. 304, 315 (1900) (stating "[w]hile no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon these facts").

298. *See supra* Part III.A-B.

299. 82 F.3d 849, 856 (1996). See *supra* notes 212-22 and accompanying text for a discussion of *Thompson*.

300. For a discussion of United States Court of Appeals cases reaching this conclusion, see *supra* Parts III.A.2, IV.C.

301. *See supra* Part III.A.2.

defendant's guilt.[302] Such comment on silence should be disallowed regardless of whether the silence occurs before or after arrest, whether the defendant has been given *Miranda* warnings, or whether the defendant begins to answer questions and then refuses to answer any more questions.[303] Defendants such as Mr. Thompson, who believe they have an unconditional right to remain silent, should be protected from comment on their silence when that silence is used to show their guilt.[304]

A Supreme Court holding that the use of pre-arrest silence is impermissible to imply guilt would not disturb the rule laid down in *Jenkins v. Anderson*,[305] which allows such comment to impeach a defendant's credibility if he takes the stand in his own defense.[306] In the *Jenkins* situation, the defendant has waived his right to remain silent by attempting to explain his behavior.[307] The prosecution should be allowed to rebut this explanation with evidence of the defendant's silence or refusal to give this explanation to the police immediately after the crime.[308] The inherent unfairness present in the use of comment to imply guilt is not present in the use of comment for impeachment purposes.[309] Use of silence for impeachment purposes should still be permissible, but using silence to imply the defendant's guilt when the defendant does not take the stand in his own defense should not be permissible.[310]

Furthermore, trial courts should be required to distinguish the use of silence for impeachment purposes from the use of silence to imply guilt.[311] The burden should be on the prosecution to convince the court that the defendant's silence is being used for impeachment and not to imply the defendant's guilt. The court should have discretion to disallow the evidence if it finds that the prosecution is using the silence

302. *See supra* Parts III.A.2, IV.C.

303. *See supra* Parts III.A.2, IV.B. See *supra* notes 234-48 and accompanying text for a discussion of the irrelevance of the timing of the *Miranda* warnings for purposes of Fifth Amendment protections.

304. *See Thompson*, 82 F.3d at 854-56. *See supra* Parts I, III.A.2.

305. 447 U.S. 231 (1980).

306. *See id.* at 239-40.

307. *See id.* at 240.

308. *See id.*

309. *See supra* Part IV.E.

310. *See supra* Part IV.E.

311. *See supra* Parts IV.A, IV.E (discussing that where a defendant does not testify, allowing the prosecution to introduce pre-arrest silence into evidence would unfairly prejudice the jury; however, once a defendant takes the stand and gives his testimony, he opens the door to admission of impeachment evidence, including evidence of pre-arrest silence).

to imply guilt. Further, the trial court should be required to give a limiting instruction to the jury, ordering them only to consider the defendant's silence for impeachment purposes and not to infer that he is guilty simply because he was silent.[312] Allowing the introduction of silence to imply guilt should be considered "plain error" by the trial court and should be grounds for reversal on appeal if the appellate court determines that the error was not harmless.[313] In making this determination, appellate courts should give great deference to the defendant's Fifth Amendment privilege against self-incrimination.

The Supreme Court should restore the inalienable constitutional protection against self-incrimination contained in the Fifth Amendment and affirm that a defendant in the United States has a constitutional right to remain silent, without being concerned that his silence may be used against him.[314] The right to remain silent means very little to a criminal defendant unless he is certain that his silence will not be used as an admission of guilt at trial.[315]

VI. CONCLUSION

The Fifth Amendment provides in part that "no person . . . shall be compelled in any criminal case to be a witness against himself."[316] According to the Supreme Court in *Miranda v. Arizona*,[317] one of the inalienable rights contained in the Fifth Amendment privilege against self-incrimination is the right to remain silent.[318] Although the Supreme Court has held that a defendant's silence after arrest and his refusal at trial to take the stand in his own defense cannot be used against him in the prosecution's case-in-chief to imply his guilt,[319] the Supreme Court has never decided the issue of whether the defendant's silence before arrest or *Miranda* warnings can be used against him in the prosecution's case-in-chief.[320]

Several of the circuits of the United States Court of Appeals are split on the issue of whether prosecutorial comment on pre-arrest silence is admissible in the prosecution's case-in-chief.[321] The Fifth and

312. *See supra* note 219.
313. *See supra* note 220 and accompanying text.
314. *See supra* Part III.A.2.
315. *See supra* Part III.A.2.
316. U.S. CONST. amend. V.
317. 384 U.S. 436 (1966).
318. *See id.* at 444.
319. *See, e.g.*, Griffin v. California, 380 U.S. 609, 615 (1965) (holding that the defendant's refusal to testify cannot be used against him).
320. *See* United States v. Thompson, 82 F.3d 849, 855-56 (1996).
321. *See supra* Part III.A.

Eleventh Circuits have allowed comments on a defendant's silence if the silence occurred before *Miranda* warnings.[322] In contrast, the First, Seventh, and Tenth Circuits have held that prosecutorial comments on a defendant's silence are impermissible regardless of whether the defendant was in custody or had been given *Miranda* warnings.[323]

Allowing a prosecutor to comment on a defendant's silence in its case-in-chief violates the Fifth Amendment privilege against self-incrimination, whether the silence occurs before or after arrest or *Miranda* warnings. The Supreme Court should resolve the confusion among the circuits and hold that the use of silence to imply guilt is a violation of the defendant's Fifth Amendment rights, even if the silence occurred before arrest. The defendant's inalienable right to remain silent should be restored, because the Constitution was "framed for ages to come and . . . designed to approach immortality as nearly as human institutions can approach it."[324]

AARON R. PETTIT

322. *See, e.g.*, United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991).

323. *See, e.g.*, United States v. Burson, 952 F.2d 1196 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989); United States *ex rel.* Savory v. Lane, 832 F.2d 1011 (7th Cir. 1987).

324. Cohens v. Commonwealth of Virginia, 19 U.S. 264, 387 (1821) (John Marshall, C.J.).